84-1263

No.

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ALEXANDER L. STEVAS.

In the Supreme Court of the United States

OCTOBER TERM, 1984

BILL RODMAN, LARRY NOLON and SAMUEL MILLER, individually and as representatives of a class of persons who are qualified journeymen electricians and inside wiremen residing in Southwest Missouri who are not members of IBEW Local 453, but who have worked out of or sought to work out of the IBEW Local 453 referral or hiring hall or who have worked under collective bargaining agreements negotiated and administered by IBEW Local 453, during and since 1976,

Petitioners,

vs.

JIM W. HENSLEY, MICHAEL BRUMLEY, GENE McGHEE, PAT SHANKS, J. L. SMITH, JOHN D. PRICE, J. C. DANNER, R. D. PORTER, ROGER TESTERMAN, DENNIS ASHCRAFT, LEROY STILLEY, JACK F. MOORE, CARL TUTORINO, and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, and its Local Union No. 453,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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February 7, 1985

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QUESTIONS PRESENTED FOR REVIEW

1. Whether employees' Federal Court claims for breach of duty of fair representation against a Union [claiming continuing unlawful hiring hall operation and unlawful fraudulent concealment, coercion and intimidation to prevent Plaintiffs from obtaining effective remedies], where no claim of employer breach of collective bargaining agreement is involved, must [by reason of 29 U.S.C. §160(b)] be brought within six (6) months from the original date of the continuing breach of duty?

2. If so, whether the timely filing of unfair labor practice charges with the NLRB or the pendency of grievance claims before a joint labor-management committee would toll the running of the statute of limitations as to remedies sought by Plaintiffs in their breach of duty of fair representation claim, including remedies beyond those normally granted by the NLRB, such as reasonable attorney's fees in connection with the remedies obtained through the NLRB and through the grievance procedures then pending?

3. Whether the District Court abused its discretion in refusing to allow Plaintiffs to file Amended Complaints seeking remedies under the Landrum-Griffin Act, 29 U.S.C. §§411, 412 and 529, as alternative theories of recovery as to which a five-year statute of limitations would be applicable, after the Supreme Court decided *Del Costello v. Teamsters*, and the Defendants raised it as a basis for summary judgment?

4. Whether the District Court abused its discretion in refusing to consider claims of malicious interference with employment opportunities or state law intentional tort claims of the type held actionable in *Farmer v. Carpenters*, which were not barred by the applicable statute of limitations?

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No.

In the Supreme Court of the United States

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BILL RODMAN, LARRY NOLON and SAMUEL MILLER, individually and as representatives of a class of persons who are qualified journeymen electricians and inside wiremen residing in Southwest Missouri who are not members of IBEW Local 453, but who have worked out of or sought to work out of the IBEW Local 453 referral or hiring hall or who have worked under collective bargaining agreements negotiated and administered by IBEW Local 453, during and since 1976,

Petitioners,

vs.

JIM W. HENSLEY, MICHAEL BRUMLEY, GENE McGHEE, PAT SHANKS, J. L. SMITH, JOHN D. PRICE, J. C. DANNER, R. D. PORTER, ROGER TESTERMAN, DENNIS ASHCRAFT, LEROY STILLEY, JACK F. MOORE, CARL TUTORINO, and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, and its Local Union No. 453,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Bill Rodman, Larry Nolon and Samuel Miller petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The Opinion of the Court of Appeals (Appendix A, *infra*) is reported at 740 F.2d 665, 117 LRRM 2071. The decision of the United States District Court for the Western District of Missouri (Appendix B, *infra*) is not reported.

JURISDICTION

The judgment of the Court of Appeals (Appendix C, *infra*) was entered on August 13, 1984; Petitioners' timely Petition for Rehearing was denied on October 26, 1984 (Appendix D, *infra*), and Petitioners' timely Motion for Reconsideration and for Rehearing En Banc was denied on November 28, 1984 (Appendix E, *infra*). On January 24, 1984, Justice Blackmun extended the time for filing a Petition for a Writ of Certiorari to and including February 7, 1985.

Original jurisdiction in the District Court was invoked under 29 U.S.C. §185 and 28 U.S.C. §1337, and Plaintiffs sought to invoke original jurisdiction under 29 U.S.C. §§411, 412 and 529 and 28 U.S.C. §1337 in their proposed amendments to Complaint. (JA 306-316)

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 29 U.S.C. §§151 et seq.), are as follows:

Section 10(b), 29 U.S.C. §160(b):

"* * * *Provided,* That no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and

the service of a copy thereof upon the person against whom such charge is made * * *. Any such complaint may be amended by the member, agent or agency conducting the hearing or the Board in its discretion at any time prior to issuance of an order based thereon. * * *"

Also involved are Rule 15 of the Federal Rules of Civil Procedure (reproduced in relevant part at Appendix F, *infra*) and provisions of the Landrum-Griffin Act, 29 U.S.C. §§411, 412 and 529 (reproduced at Appendix G, *infra*).

STATEMENT OF THE CASE[1]

Petitioners (Bill Rodman, Larry Nolon and Samuel Miller) are construction electricians who have sought to work through a hiring hall set up by joint efforts of International Brotherhood of Electrical Workers, AFL-CIO

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1. References herein to "JA" are to the *Joint Appendix* filed with the Eighth Circuit, containing 602 pages, including the District Court's docket entries, the pleadings and motions and attachments thereto. The record before the District Court also contained Plaintiffs' Proposed Standard Pre-Trial Order No. 2 (referred to herein as "PT #2") which was incorporated by reference in part in affidavits filed by Plaintiffs opposing the summary judgment motions of Defendants. (JA 317-355) The record also contains depositions of Plaintiffs and Defendants and of Michael Shanks, the current Business Agent of Defendant Local 453.

There have been three related cases involving these parties before the NLRB. The first case was initiated by a charge filed by counsel for Petitioners on May 8, 1978 (Appendix H, *infra*) on which NLRB filed complaint dated June 15, 1978. (JA 384-388) The decision of Judge Evans (JA 134-152) and the NLRB (JA 158-172) are reported in *IBEW Local 453 (Sachs Electric Co.)*, 248 NLRB 669 (1980), enforced in part 668 F.2d 991 (8th Cir. 1982). Back Pay Specification was issued in that case on March 4, 1983 (JA 108-127) but had not yet been disposed of at the time of the decision below. An NLRB Judge has entered a decision thereon subsequently which is now pending before the NLRB. The other two NLRB cases (JA 187-208, 274-300) are reported in *IBEW Local 453 (Southern Sun Electric Co. and Samuel J. Miller)*, 263 NLRB 862 (1982), enf'd 730 F.2d 520 (8th Cir. 1984) and *IBEW Local 453 (Bill Rodman)*, 258 NLRB 1427 (1981), enf'd 696 F.2d 999 (8th Cir. 1982).

(International Union Defendant) and its Local 453 (Local Union Defendant). (Jack Moore Depo. of October 14, 1982, pp. 5-8, 31) Although Petitioners are members of International Union Defendant, and they have resided within the geographic territory of Local 453 for many years, the Local Union has refused to allow them to transfer membership into Local 453, and consequently they are referred to as "travelers". (JA 136-137, 324-328)

Local 453 maintains an exclusive hiring hall arrangement with all construction employers in the Local's territory who utilize Union electricians. This means that the employer must employ electricians only through the Union's hiring hall referral. (JA 136-137, 154-157)

Local 453's hiring hall is one involving a four-book system set up through recommendation by the International Union, and utilized throughout the United States. (JA 136-154-157; Jack Moore Depo. of October 14, 1982, pp. 5-8) Only journeymen electricians who are members of Local 453 and who work as construction electricians are permitted to sign Book I, the highest priority referral book, from which all registrants must be referred before any other hiring hall applicant. (Appendix A, *infra;* JA 136, 321, 326, 330) Book II is for "travelers", persons such as Petitioners who are qualified construction electricians but who are members of some other Local of the International Union. (Appendix A, *infra;* JA 325-331) Book III is for others who are members of Local 453 but are seeking to work outside their normal classification (such as heavy highway linemen, or maintenance electricians, who are not classified as construction electricians or "inside wiremen"). Book IV is for all others, including "white paper" persons who are not members of the Union but have a permit from the Union to work. (JA 154-157)

Rodman, Nolon and Miller were among 32 "travelers" who were coerced unlawfully by Local Union agents Hensley and Danner to "pull off" of a job at Fort Leonard Wood, Missouri, where they had been working on a Book II referral from Local 453. (JA 161-164, 177-178) Those travelers were forced off that job to make room for Local 453 members who had signed in for work after the travelers had been referred to that job. (JA 161-164) Thereafter, on February 28, 1978, and April 24, Rodman and Nolon sought permission to sign Book I, but were refused (JA 139-141) until they contacted a lawyer who filed unfair labor practice charges against Local 453 (Appendix H, *infra*), and presented evidence of their qualifications to an appeals committee provided for under the collective bargaining agreement to resolve hiring hall disputes. (JA 142) The attorney filed NLRB charges on May 5, 1978, in Case No. 17-CB-1921 (Appendix H, *infra*), which resulted in a decision reported as *IBEW Local 453 (Sachs Electric Co.)*, 248 NLRB 669, 104 LRRM 1070 (1980), enforced in part, 668 F.2d 991, 109 LRRM 2524 (8th Cir. 1982).

The back pay specification was not issued in that case until March 4, 1983 (JA 108-114), and while it appears that the NLRB will grant some back pay to Petitioners and five other travelers who will benefit from that NLRB proceeding, none of Petitioners have received any back pay to the present date.

When Petitioners had first sought unsuccessfully to sign Book I, and had been unlawfully refused the right to do so, they had gone to International Union Vice President Jack F. Moore, whose office is located in Springfield, Missouri, where Local 453 is also located, and who was formerly Business Agent of Local 453 at the time the four-book hiring hall system had been put into effect at the recommendation and with the assistance of the International

Union. (JA 139; Moore Depo. of October 14, 1982, pp. 5-8) Moore had done nothing constructive for Petitioners but had told them to pursue the appeals committee remedies under the collective bargaining agreement. (JA 139, 358, 361) When they filed such claim, challenging the action of Local 453 Agent Hensley, however, this brought retaliation from Hensley through internal Union disciplinary proceedings against Rodman. (JA 140, 362) Discipline was imposed against Rodman by a Local 453 trial board. (JA 140) Although the International Union set that action aside on a technicality, the action of Defendant Jack Moore and his assistant, Defendant Carl Tutorino, failed to exonerate Rodman of the claims that he had acted improperly in filing claims against Local 453 Agent Hensley, and during the process International Union Agents Moore and Tutorino had openly sought to get Rodman to drop the NLRB proceedings mentioned above. (PT #2, p. 69; JA 329, 347-349; PT #2, p. 71; PT #2, p. 79; JA 395-396; JA 140, 397)

Because Petitioners would not drop their NLRB charges, and because they sought to testify in such proceedings and to assist each other, and other travelers to obtain remedies from the NLRB, Petitioners have been subjected to a series of threats, acts of sabotage, fines and other acts of abuse. (JA 80-81; Rodman Depo. No. I, pp. 44-77; Rodman Depo. No. II, pp. 4-174; Rodman Depo. No. III, pp. 2-142; Nolon Depo. pp. 123-181; Miller Depo. pp. 30, 46-48, 51) See also Rodman affidavit (JA 329), Nolon affidavit (JA 317) and Miller affidavit (JA 319), each incorporating facts summarized in paragraphs 179 through 261 of Plaintiffs' Proposed Pre-Trial Order No. 2.

In April 1979, Rodman was fined $500.00 (JA 438) on a pretextual claim that after he got back on the Fort Leonard Wood job, he had transported his tools from one place on the job site to another. The International Union

in procedures taking from January, 1980 (JA 523) through September, 1982 (JA 594-599), refused to set that fine aside. (JA 421-467, 471-479, 523-524, 568, 574-575, 593-599)

In October, 1979, Miller was fined $1,000.00 by Local 453 (JA 508-509). The International Union refused his appeal on May 12, 1980 (JA 553-554), but the NLRB has found in a second case that the fine was unlawfully motivated, to retaliate against Miller for his testimony and other assistance of Rodman and Nolon in the NLRB and joint appeals committee proceedings. (JA 187-208, 468, 496-497, 499-500, 506-507, 508-509, 514-519, 553-558, 187-200, 201-208, 209-210) See also *IBEW Local 453 (Southern Sun Electric Co.)*, 263 NLRB 862, 111 LRRM 1126 (1982), enf'd 730 F.2d 520, 115 LRRM 3331 (8th Cir. 1984).

In a third NLRB proceeding, the NLRB has ruled that one or more agents of Local 453 (Defendants John Price or Michael Brumley), on June 17, 1980, threatened Rodman with physical violence because of Rodman's activities seeking to remedy hiring hall violations. (JA 274-300) See *IBEW Local 453 (Bill Rodman)*, 258 NLRB 1427, 108 LRRM 1221 (1981), enf'd 696 F.2d 999, 112 LRRM 2896 (8th Cir. 1982). (JA 274-300)

In addition to the charges filed with the NLRB, Petitioners had filed charges with the "Appeals Committee" provided for in the collective bargaining agreement.[2] In that procedure, the Union does not act as the advocate for

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2. No one other than Petitioners have ever sought to utilize the appeals committee procedures, although this procedure has been the mechanism in the collective bargaining agreement since 1960 through which hiring hall grievances are to be processed. (Moore Depo. of October 14, 1982, pp. 5-8, 31; PT #2) It is futile for anyone to seek to use it. (JA 331-332, 345-346) The Union does not purport to represent the "grievant" but is the Defendant and also sits in judgment with other representatives of management as to whom the grievant has no part in the selection.

Rodman or other "grievants", but sits in judgment of the claim which alleges violations by the Union and its agents of the hiring hall procedures or of law relating to those procedures. The procedures were futile, even though Rodman's claims were known by Moore to be valid. (JA 331-332, 345-346, 351-352; Moore Depo. of October 14, 1982, pp. 35-36)

The first "appeals committee" proceeding instituted by Rodman and Nolon was heard before the first NLRB hearing. Although the appeals committee did find that Rodman and Nolon were qualified to sign Book I, the NLRB refused to defer to that as an exclusive arbitration remedy because it had failed to fulfill the statutory requirements in both failing to order any back pay or other remedies for the past violations, and had failed to grant any injunctive remedies to prevent similar future violations. (JA 144, 148; pages 11 and 15 of A.L.J. Dec. in *IBEW Local 453 (Sachs Electric Co.), supra,* JA 144, 148)

A second "appeals committee" hearing was conducted on claims by Rodman of further hiring hall discrimination on July 7, 1979, resulting in an undated decision that the complaints of Rodman were either moot or beyond the committee's jurisdiction. (JA 226-233) A third "appeals committee" hearing was conducted on July 8, 1980, concerning March 7, 1980 (JA 583-584) and April 7, 1980 (JA 584) claims by Rodman attacking the legality of the hiring hall procedures and claiming further continuing, broad-ranging violations of the rights of Rodman and other "travelers". The Petitioners assert in their complaint (JA 13-23) and in their affidavits opposing summary judgment (JA 317-355) that the appeals committee procedures are designed, not to protect, but to conceal violations of their rights and to assist the Defendants in depriving Petitioners and other travelers from rights guaranteed by law. Peti-

tioners contend that it would be futile for them to seek further procedures through the Union constitution or through the collective bargaining agreement procedures and that only the Court can grant adequate and effective relief, including restoration of attorney's fees and expenses incurred by Petitioners before the NLRB and in the other proceedings in which Petitioners have sought remedies and relief. (JA 13-23)

On September 13, 1983, the District Court granted summary judgment (Appendix B, *infra*) and refused to allow the Plaintiffs leave to file amendments to add Counts Five, Six and Seven (JA 304-316), as alternative theories under the Landrum-Griffin Act. The Eighth Circuit's decision of August 13, 1984, affirmed the District Court solely on the ground that *Del Costello v. Teamsters,* 462 U.S. 151 (1983) required the six month limitation period of 29 U.S.C. §160(b) be applied and, therefore, that claims of violations which occurred more than six (6) months before August 29, 1980, were barred. The Eighth Circuit decision states at note 3 that the third appeals committee proceeding was not at issue in this suit, a matter which Petitioners challenge as indicated below, and fails to decide whether the pendency of those grievance claims or the pendency of NLRB charges filed in May, 1978 (Appendix H, *infra*) tolled the running of the statute. The Court failed to note or discuss the continuing nature of violations. The Eighth Circuit also failed to decide the Petitioners' claims that the District Court abused its discretion in denying Plaintiffs permission to file Counts Five, Six and Seven (JA 304-316) and in refusing to exercise pendent jurisdiction over state law claims for intentional torts of the type found actionable in *Farmer v. Carpenters,* 430 U.S. 290 (1977).

REASONS FOR GRANTING THE WRIT

Under parts I, II and III below, we urge that certiorari should be granted because the decision below seriously misapplies *Del Costello v. Teamsters,* 462 U.S. 151 (1983), in ruling that the August, 1980, complaint (JA 13-23) was barred under 29 U.S.C. §160(b). Timely charges had been filed by Petitioners both with the NLRB and under the collective bargaining agreement's appeals committee procedures which were protesting the *continuing* unlawful operation of the hiring hall. Appendix H, *infra,* is a copy of the NLRB charges filed on May 8, 1978, and it shows that the Union agents were accused then of wrongfully concealing information needed by Petitioners to protect their rights, as is also alleged in paragraph 10 of Count I of the complaint. (JA 15) Review should be granted to resolve important issues of federal law and because the decision below is in conflict with other circuits on several important points discussed below.

Under Parts IV and V below, we urge that certiorari should be granted because, even if 29 U.S.C. §160(b) were found to bar claims for breach of duty of fair representation, the courts below abused their discretion in failing to exercise jurisdiction and afford remedies to Petitioners under other theories as to which Missouri's five-year statute of limitation (Section 516.120 RSMo 1978) is applicable.

Part IV claims abuse of discretion by failure to allow Plaintiffs to file amendments to complaint to assert Landrum-Griffin Act, 29 U.S.C. §§411, 412 and 529, claims of the type found actionable in *Vandeventer v. Operating Engineers,* 579 F.2d 1373, 98 LRRM 3120 (8th Cir. 1978); *Salzhandler v. Caputo,* 316 F.2d 445, 52 LRRM 2908 (2d

Cir. 1963), cert. den. 375 U.S. 946 (1963); *Keene v. Operating Engineers*, 569 F.2d 1375, 97 LRRM 3215 (5th Cir. 1978) and *Parish v. Legion*, 450 F.2d 821, 78 LRRM 2705 (9th Cir. 1971). Rule 15 calls for such amendments to be freely permitted and this Court's decision in *Foman v. Davis*, 371 U.S. 178 (1962) requires a finding of abuse of discretion in this case.

Part V contends the courts below abused their discretion in refusing to consider state law remedies for violence and other malicious intentional torts under pendent jurisdiction as authorized under *United Mine Workers v. Gibbs*, 383 U.S. 715, 61 LRRM 2561 (1966) and as approved in a hiring hall context in *Farmer v. Carpenters*, 430 U.S. 290, 94 LRRM 2759 (1977). Such abuse of discretion should be reviewed and reversed as in *Schmidt v. Oakland Unified School District*, 457 U.S. 594, 73 L.Ed.2d 245 (1982).

I.

In paragraph 10 of Count One of Petitioners' Complaint (JA 15), Plaintiffs alleged that during *and since* 1976 Defendants have wrongfully, arbitrarily, intentionally and deliberately caused Plaintiffs and other "travelers" who are qualified journeymen electricians but not members of Local 453 to be discriminated against, denied employment opportunities and subjected to coercion and violence. It further alleges that Defendants have concealed information requested and made difficult or impossible for Plaintiffs and other similarly situated to enforce their rights.[3]

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3. The Count One allegations, under paragraph 10, are as follows:

> "10. During and since 1976 the Defendants mentioned in paragraphs 5, 6 and 7, and other Local 453 members acting with them as part of an overall plan, scheme and

(Continued on following page)

Paragraph 11 of Count One of Complaint (JA 15) alleges such conduct was deliberate, intentional and malicious. Paragraphs 12 and 13 (JA 16) allege damages and injunctive relief are necessary and that a receiver should be appointed to administer the hiring hall to assure proper and fair representation of Plaintiff Class. Paragraph 14 (JA 16) alleges that the Defendants "will hide, divert, or improperly use up the assets of Local 453 to deprive the Plaintiffs and their Class of recovering the judgments herein obtained or other amounts obtained through administrative proceedings, and will wrongfully expend funds which have been exacted from Plaintiff Class, as dues, fees, fines or assessments to defend the individual Defen-

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Footnote continued—

conspiracy of Local 453 and its officers and membership, with the cooperation and encouragement, ratification or approval of IBEW International and its agents Moore and Tutorino and other agents who have joined such conspiracy, have wrongfully, arbitrarily, intentionally and deliberately caused Named Plaintiffs and Plaintiff Class to be discriminated against and denied employment opportunities because of their non-membership in Local 453, have arbitrarily and wrongfully refused to fairly represent Named Plaintiffs and Plaintiff Class in administration of the hiring hall, have made difficult or impossible enforcement of the lawful rights of Plaintiffs and their Class, have wrongfully withheld or concealed information requested by Plaintiffs which is necessary to protect their rights, or delayed furnishing same unnecessarily, have sought to coerce, intimidate and restrain them from seeking to enforce their rights, have denied Plaintiffs and their Class equal opportunities to become [members] and have a voice or any voting and other rights in the affairs of Local 453 while at the same time imposing on them working dues, fees and assessments which are used to finance the activities of Local 453, and have otherwise denied fair and equal representation to Plaintiffs and their Class in violation of Local 453's duty as exclusive bargaining agent and representative over Plaintiffs and Plaintiff Class."

The word "members" in brackets was inadvertently omitted by typist, but District Court on November 23, 1982, arbitrarily refused to allow it to be inserted by amendment (JA 99-103), which was an abuse of discretion for reasons covered in Part IV below.

dants herein, or cover up their conduct herein complained of, and will otherwise wrongfully convert the assets and affairs of Local 453 as exclusive bargaining agent of Plaintiff Class *and will continue to deny* Plaintiffs any voice or control over the affairs or activities of such organization as their exclusive bargaining agent." (Emphasis added)

First, the Eighth Circuit (Appendix A, *infra*) improperly *assumed* this was a "hybrid" case involving claims against both a Union and an employer of the type involved in *Del Costello*. In fact, as recently held in *Gordon v. Winpisinger*, 581 F.Supp. 234, 117 LRRM 2677, 2680 (E.D. N.Y. 1984), "The Employer is not a party. There is, therefore, nothing hybrid about this action. * * * Accordingly, the six-month period of limitations borrowed by *Del Costello* from §10(b) * * * does not apply." The *Gordon* decision properly ruled this question. *Del Costello* applies only in "hybrid" cases and was designed to avoid problems created by the aftermath of *United Parcel Service v. Mitchell*, 451 U.S. 56, 107 LRRM 2001 (1981) where various courts found different limitations periods applicable to employer and Union defendants in such "hybrid" cases. *Del Costello* stressed "that our holding today should not be taken as a departure from prior practice in borrowing limitations periods for federal causes of action, in labor law or elsewhere." Part II (last paragraph), 113 LRRM, p. 2744.

Second, the decision below is in direct conflict with *Lewis v. Laborers' Local 100*, ... F.2d ....., 118 LRRM 2146 (7th Cir. 1984), where the Seventh Circuit held in Part III of that opinion, 118 LRRM, pp. 2153-2155, that a complaint alleging a *continuing pattern* of unlawful hiring hall discrimination and violations, some of which conduct was within six months prior to filing of the Federal Court complaint, and which conduct is alleged to be occurring

continuously thereafter, is not barred by the running of any limitations period. Thus, even though some of the Union's misconduct occurred as much as two years before the complaint was filed in *Lewis,* the Seventh Circuit found that *Del Costello* would not bar relief from such *continuing* violations. Sufficient allegations of continuing violations were shown by the complaint alleging an ongoing course of conduct "since February, 1980", in *Lewis.* Paragraph 10 quoted in note 3 above makes the same type of claim of continuing violations, and the record in this case reveals such allegations of continuing violations to be fully established even by three NLRB decisions each enforced by the Eighth Circuit.[4]

The Eighth Circuit opinion in the present case recognized in the second paragraph (Appendix A, *infra*) that "travelers" such as Petitioners and the class they sought to benefit by this action are not permitted to sign any hiring hall book other than Book II which gets no priority in job referrals. The operation of the four-book system in such manner as to exclude "travelers" from employment opportunties is a flagrant *per se* violation of the duty of the Union to fairly represent the employees merely because of their lack of membership in the Union, and is unlawful. *Robertson v. NLRB,* 597 F.2d 1331, 101 LRRM 21 (10th Cir. 1979) (holding the same system unlawful and ordering the NLRB to order such system to be stopped). A

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4. Section 10(b) cannot be a bar to injunctive relief. *Balicer v. Longshoremen,* 86 LRRM 2559 (D. N.J. 1974); *Melville Confections, Inc. v. NLRB,* 327 F.2d 689, 55 LRRM 2241, 2242-3 (7th Cir. 1964), cert. den. 377 U.S. 933, 56 LRRM 2224 (1964). Continuing violations, including those occurring after the filing of the charge or complaint, cannot be viewed as barred by limitations. *C & P Tel. Co.,* 259 NLRB No. 30, 109 LRRM 1019 (1981), enf'd 687 F.2d 633, 111 LRRM 2165, 2169 (2d Cir. 1982); *Abilene Sheet Metal, Inc. v. NLRB,* 619 F.2d 332, 104 LRRM 3077, 3087 (note 7) (5th Cir. 1980).

Union which operates a hiring hall has an affirmative duty to tell the employees they represent everything the employees need to know in connection with their employment or efforts to obtain employment. Judge (now Chief Justice) Burger's opinion for the D. C. Circuit in *IUE, Frigidaire Local 801 v. NLRB,* 307 F.2d 679, 683, 50 LRRM 2403, 2406 (D.C. Cir. 1962), cert. den. 371 U.S. 936 recognized a similar fiduciary duty under *Restatement of Agency 2d,* §381 (1958). The Tenth Circuit has held this duty includes an obligation by a Union operating a hiring hall to affirmatively *offer* travelers the opportunity to sign Book I, the highest referral priority, so such travelers will know they are not required to take second class status in hiring hall referrals merely because they are members of some other Local. *NLRB v. Electrical Workers' Local 322 (Bechtel Power Corp.),* 597 F.2d 1326, 101 LRRM 2157, 2160 (10th Cir. 1979).

Despite the clear duty of Local 453 to offer Plaintiffs and other travelers the opportunity to sign Book I and to have referral opportunities equal to Local 453 members, the testimony of Local 453's managing agent Shanks admits that Local 453 is still operating the hall in violation of that duty. (Shanks Depo., pp. 30, 47) The Defendants, thus, continue to flout the law and continue to ignore their fiduciary duties owed to travelers and continue to fine, discipline and retaliate in other ways against anyone who dares to join with Plaintiffs in seeking to stop these unlawful practices. See *IBEW Local 453 (Bill Rodman),* 258 NLRB 1427, 108 LRRM 1221 (1981), enf'd 696 F.2d 999, 112 LRRM 2896 (8th Cir. 1982) (holding Local 453 Agent unlawfully threatened present Petitioner Bill Rodman with violence because of Rodman's pursuit of remedies against such unlawful hiring hall operations by present Defendants); *IBEW Local 453 (Southern Sun Electric Co.*

and Samuel J. Miller), 263 NLRB 862, 111 LRRM 1126 (1982), enf'd 730 F.2d 520, 115 LRRM 3331 (8th Cir. 1984) (holding Local 453 unlawfully imposed $1,000.00 fine on present Petitioner Miller because he assisted Rodman and others in seeking remedies against such unlawful hiring hall operation by Defendants). See also *IBEW Local 453* (*Sachs Electric Co.*), 248 NLRB 669, 104 LRRM 1070 (1980), enf'd 668 F.2d 991, 109 LRRM 2524 (8th Cir. 1982) (holding Local 453 Agents forced and coerced Petitioners and some 30 other "travelers" to leave a job at Fort Leonard Wood to make room for Local 453 members).

The NLRB has stated it will refuse to stop use of the unlawful four-book system in other cases as ordered by the Tenth Circuit in *Robertson v. NLRB, supra,* "until such time as the Supreme Court has passed on the question" as the NLRB explains at note 8 in *Teamsters Local 83* (*Associated General Contractors*), 243 NLRB No. 26, 101 LRRM 1508, 1510 (1979). Thus, in *IBEW Local 453* (*Sachs Electric Co.*), *supra,* NLRB General Counsel did not seek to challenge the legality of the four-book system which Local 453 *continues* to operate in violation of law. NLRB Member Jenkins, at note 3 to *Sachs Electric Co.,* stated that the hiring hall operation involved here should be ruled unlawful for the reasons expressed in his dissenting opinion in *Interstate Electric Company,* 227 NLRB 1996, 94 LRRM 1225 (1977). But since *Nassau-Suffolk Chapter of NECA,* 215 NLRB 894, 88 LRRM 1226 (1974) was overruled in *Interstate Electric Company, supra,* and in *IBEW Local 68* (*Howard Electric Company*), 227 NLRB No. 278, 94 LRRM 1229 (1977) there is nowhere else for these employees, who are Petitioners here, to turn to obtain remedies against the *continuing unlawful operation of the hiring hall, and the continuing threats, intimidation and violence* by which Plaintiffs and other travelers who seek to challenge such unlawful practices are confronted.

The NLRB General Counsel will not institute a complaint to stop such practices in view of the NLRB statement at note 8 of *Teamsters Local 83 (Associated General Contractors)*, *supra*, that the NLRB is awaiting a decision by the Supreme Court on this issue. Yet, without an NLRB complaint being filed, the Supreme Court will never have an opportunity to decide the question, since no Court can compel the NLRB General Counsel to issue a complaint. *Braden v. Herman*, 468 F.2d 592, 81 LRRM 2457 (8th Cir. 1972), cert. den. 411 U.S. 916, 82 LRRM 2999 (1973).

That leaves the only remedies available to Petitioners the breach of duty of fair representation claim under principles announced in *Vaca v. Sipes*, 386 U.S. 171, 64 LRRM 2369 (1967), plus whatever state tort remedies Petitioners may have against malicious intentional outrageous conduct by Defendants as held in *Farmer v. Carpenters*, 430 U.S. 290, 94 LRRM 2759 (1977) and similar remedies which may be fashioned under federal statutory or common law theories for such conduct. *Richardson v. Communication Workers*, 443 F.2d 974, 979, 77 LRRM 2566, 2569 (8th Cir. 1971), cert. den. 414 U.S. 818, 84 LRRM 2421 (1973); *Emmanuel v. Carpenters*, 422 F.Supp. 204, 93 LRRM 2929 (D. Nebr. 1976), aff'd 560 F.2d 382, 95 LRRM 3320, 3323 (8th Cir. 1977); *Smith v. Local Union No. 25*, 500 F.2d 741, 87 LRRM 2211 (5th Cir. 1974); *Vandeventer v. Local Union No. 513*, 579 F.2d 1373, 1377-79, 98 LRRM 3120 (8th Cir. 1978), cert. den. 439 U.S. 984, 99 LRRM 3262 (1978); *Lewis v. Laborers' Local 100*, *supra*.

The holding below cuts off these remedies merely because the wrongs, which continue today, commenced more than six months before August, 1980, when the present complaint was filed. This is a serious misapplication of *Del Costello v. Teamsters*, *supra*, and is in direct conflict

with the holding of the Seventh Circuit in *Lewis v. Laborers' Local 100, supra* (Part III at 118 LRRM, pp. 2153-2155) (recognizing that a continuing wrong is not immunized from fair representation remedies merely because those continuing wrongs commenced two years or more before the complaint was filed).

II.

The opinion below also is in direct conflict with *Guerra v. Manchester Terminal Corp.*, 498 F.2d 641, 8 FEP Cases 433, 438-440 (5th Cir. 1974), reh. den. 503 F.2d 567, which applied the principles announced in *Burnett v. New York Central R.R.*, 380 U.S. 424 (1965), and found that a timely filed charge with the NLRB tolled the running of the statute of limitations as to an action filed in District Court involving the same factual situation and same or related parties.

Guerra involved a civil rights action under 42 U.S.C. §1981. The Fifth Circuit held that federal policy should encourage resort to NLRB processes to prevent employment discrimination, and federal policy would be best served by treating the statute of limitations as having been tolled by the timely filed NLRB charges seeking remedies for the claimed discrimination. This Court's holding in *Del Costello* which applied the NLRA Section 10(b) limitations to fair representations claims in Federal Court brings into sharp focus the need for a declaration by the Supreme Court as to whether or not the timely filing of an NLRB charge in cases like the charge filed for these petitioners on May 5, 1978 (Appendix H, *infra*) should be ruled to toll the running of the statute of limitations as to the federal action, assuming that *Del Costello's* principles apply to this case.

One important reason why the NLRB charges filed for Petitioners in the *Sachs Electric* case (and in the other two cases where Rodman and Miller were found to have been unlawfully threatened or coerced with violence or fines) is that Federal Courts have the authority to grant remedies in the fair representation claim over and beyond those which the NLRB traditionally has utilized. Although the charge was filed in the *Sachs Electric* case in May, 1978, the NLRB decision was not enforced by the Eighth Circuit until January 21, 1982. *NLRB v. IBEW Local 453*, 668 F.2d 991, 109 LRRM 2524 (8th Cir. 1982). The back pay specification, to determine the amount of back pay due Petitioners and the other "travelers", was not issued until March, 1983 (JA 108-127) and the NLRB has not yet issued its decision in that case, which will take another year or more to reach the Eighth Circuit.

The very purpose for the Federal Courts, in fair representation cases, is to protect employees who are victims of arbitrary Union abuses of power, and particularly to grant remedies which only Courts can provide and which are beyond those the NLRB may provide. Thus, the fair representation remedies available in Federal Courts under *Vaca v. Sipes* and related cases *augment* those available through the NLRB. Merely because the NLRB has given a tardy recognition to its responsibilities to remedy similar abuse of power by Union agents, this Court has recognized is no sufficient reason for the Courts to abandon their responsibilities in this area, because the NLRB has been too reluctant or not fully empowered to grant sufficient relief to remedy such abuses of power.

Among remedies which the District Court should grant in this case, in addition to injunctive relief and appointment of a receiver to put the hiring hall operations in proper order and protect the Union assets from being

dissipated in fraud of Petitioners as creditors in connection with their damage awards in this case, the Court should grant Petitioners reasonable attorney's fees and costs they have incurred in the NLRB proceedings and in attempting to pursue their intra-Union remedies and any other remedies under the collective bargaining agreement. See *Emmanuel v. Carpenters,* 560 F.2d 382, 385, 95 LRRM 3320, 3323 (8th Cir. 1977), citing *Hall v. Cole,* 412 U.S. 1, 83 LRRM 2177 (1973); *Usery v. Local Union 639, Teamsters,* 543 F.2d 369, 93 LRRM 2113 (D.C. Cir. 1976); *McDonald v. Oliver,* 525 F.2d 1217, 91 LRRM 2215 (5th Cir. 1976), cert. den. 420 U.S. 817, 93 LRRM 2361 (1976); *Yablonski v. United Mine Workers,* 466 F.2d 424, 80 LRRM 3297, 3301 (D.C. Cir. 1972), cert. den. 412 U.S. 918, 83 LRRM 2296 (1973). See also *Del Casal v. Eastern Airlines, Inc.,* 634 F.2d 295, 106 LRRM 2276, 2281 (5th Cir. 1981); *Scott v. Teamsters Local 377,* 548 F.2d 1244, 94 LRRM 2505 (6th Cir. 1977), on remand, 96 LRRM 2902 (N.D. Ohio 1977); *Lowe v. Pate Stevedoring Co.,* 595 F.2d 256, 101 LRRM 2357 (5th Cir. 1979); *Bowen v. U. S. Postal Service,* 470 F.Supp. 1127, 103 LRRM 2366 (W.D. Va. 1979).

Board Member Jenkins, in his concurring and dissenting opinion in *Sachs Electric Co.,* 248 NLRB 669, 671, 104 LRRM 1070, 1073, after noting the hostility and difficulties that Petitioner Rodman faced necessitating his retaining of attorneys to assist him in seeking to sign Book I, argued that the NLRB should grant attorney fees as remedies, stating:

> "When the board ultimately vindicates these rights, and finds that they were violated in an arrogant demonstration of raw power, simple justice and commonsense demand that the consequences of such acts be fully remedied to the extent that this is feasible. Otherwise, the apparent impunity with which such

> acts were committed will be seen as having been justified, and the power demonstrated by the misconduct will be remembered with more deference than the Board's response to it. Nothing could more seriously discredit both the processes of the Board and the purposes of the Act."

But the majority was not persuaded that the Board should grant such attorney fees, and the authorities cited in the foregoing paragraph call for the Federal Court to grant that relief in this case to fulfill the Court's responsibility in protecting Petitioners from such "arrogant demonstration of raw power."[5]

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5. The importance of this case is further shown by the fact that the Respondents have not only delayed the back pay proceedings so that Petitioners have never yet gained any back pay from the NLRB proceedings commenced by the May 5, 1978, charges (Appendix H, *infra*), but Respondents have filed with the District Court motions (JA 12) for attorney's fees allegedly incurred in defending the present action. Although the present complaint was timely under *Butler v. Teamsters Local 823*, 514 F.2d 442, 88 LRRM 3169 (8th Cir. 1975), cert. den. 423 U.S. 924, 90 LRRM 2921 (1975), when it was filed, which was before *United Parcel Service v. Mitchell*, 451 U.S. 56, 107 LRRM 2001 (1981), the Eighth Circuit has retroactively applied *Del Costello* to justify dismissal, and yet Petitioners face claims of attorney's fees which would totally wipe out any monetary relief in the *Sachs Electric Co.* case and would fulfill NLRB Member Jenkins' prophecy that without attorney fees and full relief for Petitioners the raw power of Defendants exercised in defiance of the law will prevail. The Supreme Court, in considering certiorari in this case, is the last hope which Petitioners have against such "arrogant demonstration of raw power." There will otherwise be no protection against the continuing coercion, intimidation, violence and unlawful hiring hall, which the opinion below (Appendix A, *infra*), states is being used to continually discriminate against "travelers" who are treated as second class citizens.

Present Local 453 Business Agent Shanks refuses to correct the unlawful hiring hall practices and says he is not changing anything and is still denying Plaintiffs opportunities to sign Book I. (Shanks Depo., pp. 22-23, 30, 47, 48, 49, 53, 63)

III.

Another conflict between the decision below and decisions from other circuits is the failure of the Eighth Circuit and District Court to recognize that the third appeals committee proceeding instituted by Rodman in March and April, 1980 (JA 235-236, 583-584), should be deemed a part of this case and tolled the statute of limitations on behalf of all Plaintiffs and the other travelers who were sought to be protected by those broad appeals committee proceedings. Footnote 3 to the Eighth Circuit decision (Appendix A, *infra*) notes the District Court refused to consider those issues involved in the complaint, apparently on the theory the complaint was filed prematurely, after the appeals committee hearing on July 8, 1980 (JA 235, 583) but before the decision of that committee was released in an undated decision. (JA 234-239) Our brief to the Eighth Circuit summarized fully, at pp. 14-18, the events which demonstrated that the third appeals committee proceeding was a futile undertaking by Petitioners and the unfairness thereof, as well as the facts which show that the appeals committee was intent from the outset to deny Petitioners any relief, and that the International Union Defendant and its agents Moore and Tutorino, and the appeals committee, concealed information from Petitioners and conducted the proceedings in such manner as to make sure Petitioners would gain nothing through those procedures.

Compare the result in *ACRI v. Machinists Union,* ..... F.Supp. ....., 118 LRRM 2112 (N.D. Calif. 1983), where the Federal Court complaint was filed August 6, 1980, and it was held to include the matters submitted to an arbitrator whose decision did not issue until October 14, 1981, making the Court proceedings timely because the institution of arbitration proceedings tolled the running

of the statute of limitations. That result is consistent with *Del Costello* and with *NLRB v. Fant Milling Co.*, 360 U.S. 301, 44 LRRM 2236 (1959) (holding that events occurring after the filing of an NLRB charge were properly considered). Moreover, the concealment by the Defendants of hiring hall records and the other fraud, intimidation and violence which have been established by the three prior NLRB decisions as enforced by the Eighth Circuit disclose fraudulent conduct which should have been ruled to toll the running of the statute of limitations from the time when Rodman and Nolon first commenced seeking to sign Book I in early 1978, as adjudicated in the *Sachs Electric Co.* case. See *NLRB v. IBEW Local 453*, 668 F.2d 991, 109 LRRM 2524, at 2525, and NLRB Member Jenkins' dissenting and concurring opinion at 248 NLRB p. 671, 104 LRRM pp. 1072-1073. The Eighth Circuit's failure to consider such fraudulent and otherwise unlawful conduct of Local 453 and other Defendants tolled the statute of limitations is in conflict with *Garment Workers v. NLRB*, 463 F.2d 907, 80 LRRM 2716, 2727-2728 (D.C. Cir. 1972) and Supreme Court decisions therein cited. *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946), quoting *Bailey v. Glover*, 88 U.S. (21 Wall.) 342, 348 (1874).

IV.

It was an abuse of discretion for the District Court to have refused Petitioners' application for leave to file amendments to their complaint to allege claims under the Landrum-Griffin Act, 29 U.S.C. §§411, 412, 529, as to which a longer statute of limitations and other remedies are available. The controlling decision by the Supreme Court in *Foman v. Davis*, 371 U.S. 178 (1962) called for such abuse to be corrected.

Even though the District Court relied on *Buder v. Merrill Lynch, Pierce, Fenner & Smith,* 486 F.Supp. 54, 55 (E.D. Mo. 1980), as justification for the denial of leave to amend because the complaint had pended for more than two years, the District Court refused to adequately consider the justification for the amendments, due to the Supreme Court decisions announced in June, 1983, in *Del Costello* (drastically altering the rules as to what statute of limitations applies in at least "hybrid" cases involving breaches of duty of fair representation and breach of collective bargaining agreement cases), as well as the July, 1983, decision in *Carpenters Local 610 v. Scott,* 460 U.S. 1034, 113 LRRM 3145 (1983) (rendering claims by Petitioners under 42 U.S.C. §1985 which had been utilized in *Murphy v. Operating Engineers,* 99 LRRM 2074, 2124-2129 (N.D. Ohio 1978) for remedies to hiring hall violations and violence associated therewith conducted through conspiracies of the type alleged in Petitioners' original complaint unavailable).

The District Court relied primarily on the Eastern District's decision in *Buder,* which decision was *reversed* by the Eighth Circuit in *Buder v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 644 F.2d 690 (8th Cir. 1981). The Eighth Circuit, thus, abused its discretion in failing to reverse the District Court on this point, and certiorari should be granted to determine this important matter within the Supreme Court's supervisory authority to enforce the policy of Civil Rule 15 which favors liberally allowing amendments and which amendments should relate back to the date the original petition was filed. See Rule 15(c) (Appendix F, *infra*). As indicated at note 3 above, this was the second arbitrary refusal to allow an amendment, thus demonstrating the gravity of the multiple abuse in this case.

Although NLRB Judge Evans (JA 139-141, 144-145) and the NLRB (JA 158-167) had found Local 453 unlawfully threatened and imposed unlawful discipline on Petitioner Rodman because of his having sought protection through the NLRB and because he had sought assistance of International Union Vice President Moore and because he employed Attorney Max Lilley, that portion of the NLRB order was denied enforcement by the Eighth Circuit. (JA 179-180) *NLRB v. IBEW Local 453 (Sachs Electric Co.)*, 668 F.2d 991, 994-5, 109 LRRM 2524, 2527 (8th Cir. January 21, 1982). Congress has given Federal Courts responsibility to protect against infringements of the right of free speech, under 29 U.S.C. §411(a)(2) and against unlawful discipline under 29 U.S.C. §§411(a)(5) and 529. *Salzhandler v. Caputo*, 316 F.2d 445, 52 LRRM 2908 (2d Cir. 1963), cert. den. 375 U.S. 946, 54 LRRM 2715 (1963) and *Hall v. Cole*, 412 U.S. 1, 83 LRRM 2177 (1973) are clear precedent that Federal Courts should not allow Unions to inflict discipline because of "false statements" Union members are alleged to have made, as was the basis of the internal Union charges filed by Defendant Hensley against Rodman for which he was disciplined. (JA 362)[6]

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6. Hensley's internal Union charges (JA 362) state: "Mr. Rodman made false statements and sent them in writing to the IBEW Eleventh District Vice President in a letter dated March 2, 1978. He accused me of by-passing his name on the work book when he, in fact, was not current on the book. Also, he contacted an attorney by the name of Max Lilly, [sic] who came to my office on or about March 14, 1978, stating that he was representing Bill Rodman. Mr. Lilly [sic] stated that he had read the IBEW Constitution, Local Union 453 By-Laws and the Inside Working Agreement which he is not entitled to have. Thereby, I am filing charges against Mr. Rodman for creating dissension, slandering and giving information to persons not entitled to such." Aside from the fact that the NLRB decision has now found that it was Hensley who unlawfully had denied Rodman the right to sign Book I twice at that time, and had stated "No

(Continued on following page)

The abuse of discretion of the District Court in denying leave to file the amendments is displayed by the fact that the District Court recognized that these alternative theories would not be subject to the six-month statute of limitation applied in *Del Costello*,[7] and by the fact that there is clear precedent for finding hiring hall discrimination of the type here involved is unlawful discipline subject to remedies under 29 U.S.C. §§411, 412 and 529. *Vandeventer v. Operating Engineers*, 579 F.2d 1373, 98 LRRM 3120 (8th Cir. 1978). See also *Keene v. Operating Engineers*, 569 F.2d 1375, 97 LRRM 3215 (5th Cir. 1978) and *Parish v. Legion*, 450 F.2d 821, 78 LRRM 2705 (9th Cir. 1971), both finding violations of 29 U.S.C. §§411, 412 and 529 for refusals by locals to allow "travelers" to transfer membership into the local, as is also one of the claims brought in the proposed amendments. See note 3, *supra*, concerning the District Court's earlier arbitrary denial of a Motion to Amend dated November 23, 1982. (JA 99-103)

V.

The refusal of the District Court to assert jurisdiction on state law violations, under pendent jurisdiction, as

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Footnote continued—

goddam traveler is going to sign Book I", 248 NLRB p. 671, 104 LRRM p. 1073, *Salzhandler v. Caputo* makes clear that Hensley's charges were a per se violation of 29 U.S.C. §411(a)(2), for which the District Court should have allowed Rodman to seek redress once the Eighth Circuit had denied the NLRB enforcement on that portion of the *Sachs Electric Co.* case, and particularly in the light of the subsequent $500 fine on Rodman and $1,000.00 fine on Miller and the subsequent and continuing violence and intimidation shown in this record.

7. See *Gordon v. Winpisinger*, 581 F.Supp. 234, 117 LRRM 2677 (E.D. N.Y. 1984), holding *Del Costello* does not apply to Landrum-Griffin Act claims. The District Court admitted these new theories "would solve Plaintiffs' jurisdictional problems" (Appendix B, *infra*), created by *Del Costello* only one month before Plaintiffs sought leave to amend.

authorized under *United Mine Workers v. Gibbs*, 383 U.S. 715, 61 LRRM 2561 (1966) for violence and coercion of the type which the cases cited in *Gibbs* make plain are not pre-empted and for intentional infliction of emotional distress and other tort theories found not to be pre-empted in *Farmer v. Carpenters*, 430 U.S. 290, 94 LRRM 2759 (1977), also was a clear abuse of discretion which should be reviewed and vacated herein. *Schmidt v. Oakland Unified School District*, 457 U.S. 594, 73 L.Ed.2d 245 (1982). The complaint filed by Petitioners (JA 13-23) clearly invoked such pendent jurisdiction theories, as to each count, and it is clear that the *Del Costello* ruling does not reduce the Missouri five year period of limitation as to such claims. Section 516.120 RSMo 1978. The record in this case discloses threats of violence which have been adjudicated and left without any damage remedy. *IBEW Local 453 (Bill Rodman)*, 258 NLRB 1427, 108 LRRM 1221 (1981), enf'd 696 F.2d 999, 112 LRRM 2896 (8th Cir. 1982). Other instances of violence and intimidation actionable under Missouri law are replete in the record. It is unconscionable in these circumstances to leave Petitioners without any relief in this case.[8]

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8. There is no question but that the individual Defendants can be held personally accountable in damages under either 29 U.S.C. §411 or state tort law theories. *Parker v. United Steelworkers*, 642 F.2d 104, 106 LRRM 3038 (5th Cir. 1981); *Morrissey v. National Maritime Union*, 544 F.2d 19, 92 LRRM 3211 (2d Cir. 1976); *Keene v. Operating Engineers*, 569 F.2d 1375, 97 LRRM 3215 (5th Cir. 1978); *Maxwell v. UAW Local 1306*, 489 F.Supp. 745, 105 LRRM 3245 (C.D. Ill. 1980).

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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February 7, 1985

APPENDIX

APPENDIX A

(Filed August 13, 1984)

UNITED STATE COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-2384

Bill Rodman, Larry Nolon and Samuel Miller, individually and as representatives of a class of persons who are qualified journeymen electricians and inside wiremen residing in Southwest Missouri who are not members of IBEW Local 453, but who have worked out of or sought to work out of the IBEW Local 453 referral or hiring hall or who have worked under collective bargaining agreements negotiated and administered by IBEW Local 453, during and since 1976,

Appellants,

v.

Jim W. Hensley, Michael Brumley, Gene McGhee, Pat Shanks, J. L. Smith, John D. Price, J. C. Danner, R. D. Porter, Roger Testerman, Dennis Ashcraft, Leroy Stilley, Jack F. Moore, Carl Tutorino, and International Brotherhood of Electrical Workers, AFL-CIO, and its Local Union No. 453,

Appellees.

Appeal from the United States District Court for the Western District of Missouri

Submitted: April 30, 1984
Filed: August 13, 1984

Before ROSS, McMILLIAN, and FAGG, Circuit Judges.

PER CURIAM.

This was an action brought by three named plaintiffs, Rodman, Nolon, and Miller,[1] which contained four separate counts. Count one alleged a violation of the duty of fair representation under 29 U.S.C. § 185 and 28 U.S.C. § 1337. Counts two and three alleged violations of the Civil Rights Act, Sections 1983, 1985, and 1988, as well as violations of "Missouri common law."[2] Count four was brought by Miller and alleged a violation of breach of duty of fair representation under 29 U.S.C. § 185 and violations of §§ 1983, 1985, 1988, and "Missouri common law." Appellants appeal from a grant of summary judgment in favor of the defendants. We affirm.

Plaintiffs have essentially filed this action alleging discrimination against the defendants for maintenance of a union hiring hall. The union hiring hall is maintained and operated by a book registration system. Book I is used for local union members who are given hiring referral preference. Book III is used for local members who are "out of classification" but also get priority. Book II is used for "travelers" like the appellants. These travelers, members of other IBEW locals, are only permitted to sign in Book II which gets no priority in job referrels.

The alleged incidents took place from 1977 through 1978. Appellant Nolon used the grievance procedure in 1978 and appellant Rodman used it in 1978, 1979, and March

1. The district court dismissed the allegations relating to the class action, because no motion was made to certify the class.

2. Counts two and three and the civil rights claims of count four were dismissed by the district court and are not being appealed.

of 1980.[3] This action was filed on August 29, 1980. Nolan filed his grievance in April 1978, and it was ruled on in July 1978. Miller never went through the appeals committee proceedings. Rodman's first grievance was decided in April of 1978, his second in October 1979.

In the case of *DelCostello v. Teamsters*, ... U.S. ....., 103 S.Ct. 2281 (1983) the Supreme Court held that the six month statute of limitations of LMRA Section 10(b), 29 U.S.C. § 160(b) was the applicable limitation period for hybrid section 301 cases (breach of contract by employer/breach of duty of fair representation against union). This court has held that *DelCostello* is to be applied retroactively. *Lincoln v. District 9 IAM*, 723 F.2d 627 (8th Cir. 1983). Since the appellants did not file until August 1980, their duty of fair representation claims are clearly time barred. Because we find the appellants to be out of time, we need not address the remaining contentions on appeal.

Affirmed.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

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3. The March 1980 procedure was dismissed by the district court for not being at issue in this suit.

APPENDIX B

(Filed September 16, 1983)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI SOUTHERN DIVISION

BILL RODMAN, et al., Plaintiffs,	)	
vs.	)	No. 80-3252-CV-S-4
JIM W. HENSLEY, et al., Defendants.	)	

ORDER

This action pends on numerous motions for summary judgment filed by all remaining defendants. Plaintiffs have filed motions for leave to file amended complaint and a motion to dismiss complaint without prejudice.

There are four counts remaining: Count I alleges a breach of the duty of fair representation arising from discrimination in the administration and referral of the exclusive hiring hall maintained by defendant, Local 453; Counts II and III allege claims under 42 U.S.C. § 1983 involving the same conspiracy between the defendants and City of Ash Grove Police Officer Randy Glessner, resulting in the false arrest of plaintiff Rodman by Officer Glessner on September 2, 1978 (plaintiffs stipulate that these counts involve the same September 2, 1978, Rodman-Glessner incident, Nolon Depo., March 16, 1983, pp. 194-195); and Count IV alleges that defendants breached their duty of fair representation in denying plaintiff Miller employment, fining him for working with a non-union company, threatening him with loss of his pension benefits and refusing him IBEW membership.

PROCEDURAL BACKGROUND

Plaintiffs filed this action on August 29, 1980. The complaint originally had four counts brought by the named plaintiffs, Bill Rodman, Larry Nolon and Samuel Miller in their behalf and as class representatives. The defendants named in the original suit were Local 453 of the International Brotherhood of Electrical Workers and certain officers and members of Local 453, including Jim W. Hensley, former business manager for the Local; the International Brotherhood of Electrical Workers and certain officers and employees of the International Brotherhood of Electrical Workers including Jack Moore and Carl Tutorino; Randy Glessner an alleged policeman for the City of Ash Grove and deputy sheriff for Greene County, Missouri; the City of Ash Grove, Missouri; and Greene County, Missouri.

The complaint alleged claims under 29 U.S.C. §§ 185, 28 U.S.C. §§ 1337 and 1343, 42 U.S.C. §§ 1983, 1985 and 1988, and also under Missouri common law.

Since the original filing of this complaint, the Court has dismissed the suit as to defendant City of Ash Grove, Missouri and defendant Greene County, Missouri. In its order dated September 28, 1981, the Court dismissed the claims brought under 29 U.S.C. § 185, 42 U.S.C. §§ 1985 and 1988, Missouri common law, and as to Count IV those portions alleging a breach of 42 U.S.C. § 1983. In addition, the Court denied the motion to dismiss as to Counts I and IV relative to allegations asserting a breach of the duty of fair representation and claims under 42 U.S.C. § 1983 in Counts II and III. In an order dated January 12, 1982, the Court dismissed the complaint as to defendant Randy Glessner. Finally, in an order dated August 6, 1982, the Court struck the class action allegations of the complaint.

For the reasons that follow, the defendants' motions for summary judgment will be granted. Plaintiffs' motion for leave to amend complaint and motion for leave to dismiss without prejudice will be denied.

It is obvious from the pleadings and supporting affidavits that defendants' motions for summary judgment can be granted on numerous alternative theories.

I. DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

In contemplating a motion for summary judgment under Rule 56, Fed.R.Civ.P., this Court is mindful of the strict standards imposed by the Eighth Circuit Court of Appeals. In *Klinge v. Lutheran Charities Ass'n of St. Louis,* 523 F.2d 56 (8th Cir. 1975), the Court stated that such a motion is to be viewed in the light most favorable to the opposing party who also must receive the benefit of all reasonable inferences obtainable from the material before the Court. In *Butler v. MFA Life Ins. Co.,* 591 F.2d 448 (8th Cir. 1979), the Court held that summary judgment should not be granted unless the moving party has established his right to judgment with such clarity that no room for controversy remains and has demonstrated that the nonmoving party is not entitled to recover under any discernable circumstances.

Counts I and IV allege a breach of the duty of fair representation by the union arising from discrimination in the administration and referral of the exclusive hiring hall maintained by the defendant, Local 453. The plaintiffs allege that the union breached its duty of fair representation in that the union officials conspired to deny the plaintiffs access to the registration books which offered greater employment opportunities and that plaintiffs, Rodman and Miller, were improperly fined by the union. The

union hiring hall is maintained and operated on a four book registration system. The alleged basis of the discrimination is the plaintiffs' status as "travelers." Traveler denotes union members who are members of a local union other than the one in which they are seeking employment opportunities. This discrimination entails favoritism towards those union members of the local in which the exclusive hiring hall is operated. It is further alleged that union officials took steps to restrict the plaintiffs' exercise of their labor rights secured by §§ 7 and 8 of the National Labor Relations Act, 29 U.S.C. §§ 157, 158.

(*A*) *STATUTE OF LIMITATIONS—§ 10(b), National Labor Relations Act, 29 U.S.C. § 106(b)*

It is clear that plaintiffs' allegations in Counts I and IV alleging a breach of the duty of fair representation are barred by the six month statute of limitations as contained in § 10(b), National Labor Relations Act, 29 U.S.C. § 160(b). In *Del Costello v. International Brotherhood of Teamsters,* ..... U.S. ....., 51 U.S.L.W. 4693 (June 8, 1983), the United States Supreme Court ruled that § 10(b) of the NLRA is the proper statute of limitations to govern claims against a union for breach of the duty of fair representation as well as claims against an employer for breach of the collective bargaining agreement. *Id.* at ..... U.S. ....., 51 U.S.L.W. at 4694. The alleged incidents in the case at bar took place in or about 1977 through 1978. Plaintiff Nolon utilized the grievance procedure in 1978 and plaintiff Rodman utilized the grievance procedure three times, 1978, 1979 and in March of 1980. Plaintiff Miller had not prior to the filing of this complaint utilized the grievance procedure. The third time that plaintiff Rodman utilized the grievance procedure, March 1980, is not part of the subject matter of this suit since it occurred after the filing of the complaint.

This suit was filed on August 29, 1980. During oral argument, plaintiffs' counsel was unable to distinguish the *Del Costello* holding from the case at bar and this Court is of the opinion that it cannot be distinguished; therefore, the plaintiffs' action under Counts I and IV is barred by the statute of limitations found in § 10(b).

(*B*) *SUBJECT MATTER JURISDICTION: DUTY OF FAIR REPRESENTATION*

This Court in an order issued September 28, 1981 held that jurisdiction was proper in the case at bar since the case was basically a suit for hiring hall discrimination. Upon reconsideration this Court is of the opinion given the present status of pending or resolved NLRB proceedings that primary jurisdiction lies with the Board due to the realistic potential for conflict with and frustration of the policies and rights guaranteed by the National Labor Relations Act.

The general rules of pre-emption were stated in *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1959) for two types of labor cases, *those clearly protected* and *those arguably protected* by §§ 7 and 8 of the National Labor Relations Act, 29 U.S.C. §§ 157, 158 (1976). *Id.*, at 244-245. Although the Supreme Court attempted to establish "relatively easy" guidelines for the pre-emption doctrine in *Motor Coach Employees v. Lockridge*, 403 U.S. 274, 289-290 (1971), the standards have continually been explored and defined. *New York Telephone Company v. New York Labor Department*, 440 U.S. 519, 527-529 (1980); *Sears, Roebuck and Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180, 187-197 (1978); and *Farmer v. Carpenters*, 430 U.S. 290, 296-303 (1977). The rationale for the general rule of pre-emption indicates that it is not the designated legal category or principle [tort, contract,

labor, etc.] in which the claims are framed that is the controlling center of focus but rather the "conflicting regulation of conduct." *Motor Coach Employees,* 403 U.S. at 292. *See also, Local 100, United Association of Journeymen and Apprentices v. Borden,* 373 U.S. 690 (1963). This is particularly important in those cases "arguably subject" to the pre-emption doctrine, *Sears, Roebuck and Co. v. San Diego County District Council of Carpenters,* 436 U.S. 180, 197 (1978); *Farmer v. Carpenters,* 430 U.S. 290, 300-301 (1977); and *Rodriguez v. Bar-S Food Co.,* 539 F.Supp. 710, 714 (D. Colo. 1982), where the courts have utilized somewhat of a "frustration test." *Wilkes-Barre Publishing Co. v. Newspaper Guild of Wilkes-Barre,* 504 F.Supp. 54, 66 (N.D. Pa. 1980) (summarizing *New York Tel. Co.,* 440 U.S. 519).

The vague boundaries of the pre-emption doctrine are compounded with difficulty by numerous exceptions. Such exceptions exist, "where Congress has affirmatively indicated that such power should exist," where it cannot be presumed "that Congress meant to intrude so deeply into areas traditionally left to local law" [mostly physical violence and property damage], *Motor Coach Employees,* 403 U.S. at 297-298, and where the duty of fair representation has been breached. *Vaca v. Sipes,* 386 U.S. 171, 177 (1967). By virtue of the union's exclusive authority to represent employees, the union has a duty to represent all members without hostility and discrimination, and in good faith. *Id.* at 177, 190. *See, Russom v. Sears, Roebuck & Co.,* 558 F.2d 439, 442 (8th Cir. 1977). The rationale for the duty of fair representation is based upon the assumption that "the vast majority of" these cases cannot "give rise to actual conflict" with the federal labor policies. *Motor Coach Employees,* 403 U.S. at 301; *Augspurger v. Brotherhood of Locomotive Engineers,* 510 F.2d 853, 857-859 (8th

Cir. 1975). An employee-employer relationship is not necessary to create a union's duty of fair representation.

Anderson v. United Workers Int'l Union, 641 F.2d 574, 578 (8th Cir. 1981). Although the duty of fair representation has been given a broad definition, the courts are required to restrict their jurisdiction in deference to the policies underlying the pre-emption doctrine.

Initially, hiring hall discrimination was deemed to be within the exclusive jurisdiction of the NLRB, *Local 100, United Assocation of Journeymen, Plumbers v. Borden*, 373 U.S. 690, 698 (1963), since it did not involve activities essentially internal to the union but bore directly on the employee's employment relationship. *Motor Coach Employees*, 403 U.S. 274, 295-296; and *Rodriguez v. Bar-S Food Co.*, 539 F.Supp. at 715. Since the *Vaca* decision established the duty of fair representation, the courts have taken varied views of the exclusiveness of hiring hall discrimination in the NLRB. Cases holding concurrent jurisdiction based on the duty of fair representation exception: e.g., *Smith v. Sheet Metal Workers*, 500 F.2d 741, 748 (5th Cir. 1974); and *Bailey v. Boilermakers Local*, 480 F.Supp. 274, 281 (W.D. W.Va. 1979). Cases holding exclusive NLRB jurisdiction: e.g., *Mackenzie v. Operating Engineers*, 472 F.Supp. 1025 (D.C. Miss. 1979); *Kupec v. Plumbers, Local 75*, 101 LRRM 3052 (E.D. Wis. 1979); and *Daniels v. Pipefitters, Local 342*, 95 LRRM 3290 (N.D. Cal. 1979). Questioning NLRB exclusive jurisdiction, see *Koenig v. Clark*, 536 F.Supp. 753, 763 n. 17 (D. N.J. 1982). Although not directly at issue, the Supreme Court in *Farmer v. Carpenters*, 430 U.S. 290, 293 n. 3 (1977) restated the holding of *Borden* (exclusive NLRB jurisdiction), *Id.* at 300 n. 9, that "discrimination in hiring hall referrals constitutes an unfair labor practice under §§ 8(b)3(1)(A) and 8(b)(2) of the NLRA," *Id.* at 300 n. 11,

and further that "Whether a hiring hall practice is discriminatory and therefore violative of federal law is a determination Congress has entrusted to the board [NLRB]." *Id.* at 303 n. 12. The Eighth Circuit in *Vandeventer v. Local Union No. 513,* 579 F.2d 1373 (8th Cir. 1978) restated the exclusive jurisdiction argument but rejected it based on an expressed exception found in actions arising under the Labor Management Reporting and Disclosure Act, 29 U.S.C. § 411(a)(5). *Id.* at 1377.

Conceded, there are divergent views of the NLRB's exclusive jurisdiction but it has become obvious that the plaintiffs in bringing charges before the NLRB has effectively denied this Court jurisdiction and placed the primary jurisdiction before the NLRB, *New York Telephone Co. v. New York Labor Department,* 440 U.S. 519, 528 n. 12 (1979); and *Associated General Contractors of North Dakota v. Otter Tail Power Co.,* 611 F.2d 684, 692-693 (8th Cir. 1979), since the same conduct alleged in Counts I and IV is or has been the subject of proceedings before the NLRB. Presently there exists a realistic risk of conflict and frustration of policies underlying the NLRA and the rights guaranteed thereby. Three cases before the NLRB have dealt extensively with the conduct sought to be restricted in the case at bar: *Sachs Electric, Donald Jones and IBEW, Local Union 453,* Case No. 17-CB-1921 (1980), 248 NLRB No. 92, 104 LRRM 1070 enf'd as modified, 668 F.2d 991, 109 LRRM 2524 (8th Cir. 1982); *IBEW, Local 453 and Southern Sun Electric Corp.,* Case No. 17-CB-2192 (1982); and *IBEW, Local 453 and Bill Rodman,* Case No. 17-CB-2269, 258 NLRB No. 195, 108 LRRM 1221 (1981), enf'd 696 F.2d 999, 112 LRRM 2896 (8th Cir. 1982). All three actions resulted in extensive protective orders being issued that would effectively protect plaintiffs' rights as guaranteed by the NLRA.

Oral argument on defendants' various motions for summary judgment was held on September 6, 1983 in order for plaintiffs to more effectively rebut the suggested grounds for granting defendants' motions. Plaintiffs' counsel was unable to distinguish those cases before the NLRB and did not specifically address the issue of primary jurisdiction. Instead, plaintiffs' attorney spoke frequently of this Court being collaterally estopped to deny any fact or law as found in the NLRB proceedings. Plaintiffs' attorney could not and this Court cannot effectively explain how this cause can proceed to trial without serious risk of conflict with the prior NLRB proceedings. Such a conflict would certainly "frustrate" the policies and guidelines as established by the National Labor Relations Act and its enforcement body, the NLRB. *See, New York Telephone Co. v. New York Labor Department,* 440 U.S. 519, 527-529 (1979); *Sears, Roebuck & Co. v. San Diego County District Council of Carpenters,* 436 U.S. 180, 187-197 (1978); *Farmer v. Carpenters,* 430 U.S. 290, 296-303 (1977); *Motor Coach Employees v. Lockridge,* 403 U.S. 274, 291 (1971); *Local 100, United Association of Journeymen and Apprentices v. Borden,* 373 U.S. 690 (1963); *Rodriguez v. Bar-S Food Co.,* 539 F.Supp. 710 (D. Colo. 1982); and *Wilkes-Barre Publishing Co. v. Newspaper Guild of Wilkes-Barre,* 504 F.Supp. 54, 65-66 and n. 18 (N.D. Pa. 1980). Most importantly, plaintiffs have received substantial relief from the NLRB proceedings.

(C) IBEW'S LIABILITY FOR BREACH OF DUTY OF FAIR REPRESENTATION

The IBEW, International, does not owe the plaintiffs a duty of fair representation because by law it is a separate legal entity and is not legally responsible for the acts and omissions of Local 453 unless the plaintiffs can establish facts which give rise to common law agency between the

two entities. *Wentz v. International Brotherhood of Electrical Workers*, 578 F.2d 1271 (8th Cir. 1978).

In *Kuhn v. National Association of Letter Carriers, Branch 5*, 528 F.2d 767 (8th Cir. 1976), the court held that in order for a union member to bring suit against the union for breach of fair representation, the union must be the exclusive bargaining agent of the employee, stating, "such exclusive representation is a necessary prerequisite to a statutory duty to represent fairly. . . ." *Id.* at 770. *See also, Carbon Fuel Company v. Mine Workers*, 444 U.S. 212 (1979); *United Mine Workers v. Coronado Company*, 259 U.S. 344 (1922); and *Teamsters Local 30 v. Helms Express, Inc.*, 591 F.2d 211, 217 (3d Cir. 1979). As stated in *Carbon Fuel Company v. Mine Workers, supra*, "it must be clearly shown . . . that what was done was done by their [the International] agents in accordance with their fundamental agreement of association." *Id.* at 217. The International organization is under no obligation to take disciplinary or other action to control the local union or its members unless there is a contractual obligation. *Id.* at 221-222. In *Wentz v. International Brotherhood of Electrical Workers, supra*, the employee sought damages from the local union and the international for the union's failure to enforce reasonably safe working conditions. The district court granted the defendant's motion for dismissal and held that the local and international union were separate and distinct entities. *Id.* at 1272. The Eighth Circuit affirmed the lower court decision concluding that the international union could not be held liable for the employee's damages until the plaintiff alleged facts which would satisfy the ordinary requirements for common law agency. *Id.*

Plaintiffs have not satisfied the requirement of producing facts which would give rise to common law agency between Local 453, and the International union. Plaintiffs

claim specifically that when they approached the international union for assistance in resolving their conflicts with the local, the international union official, defendant Moore, told them to proceed by the appeals procedure explicitly set forth in the collective bargaining agreement. Plaintiffs argue that the international union should be held liable for the local union's discriminatory policies toward the travelers since the International union assisted the local in setting up the hiring hall structure. This argument failed to establish the causal connection between any positive actions taken or omitted by the International in directly causing the discriminatory policies within the hiring hall. Plaintiffs do not allege that the structure established with the assistance of the International is per se discriminatory. It is only when discriminatory policies are utilized by a local union to implement the system that the system results in a violation of rights guaranteed by the National Labor Relations Act. Finally, the plaintiffs argue that since the International union "could" take action against the local, they are liable for any illegal action taken by the local. Plaintiffs have produced no facts showing a sufficient nexus between a positive omission or duty of the International with regard to the actions taken by the local union. *Carbon Fuel Company v. Mine Workers*, 444 U.S. at 221-222; *United Mine Workers v. Coronado Company*, 259 U.S. at 395; and *Wentz*, 578 F.2d at 1273. See also these cases relative to the establishment of common law agency: *Sharp v. W & W Trucking Company*, 421 S.W. 2d 213, 220 (Mo. banc 1967); *Gardner v. Simmons*, 370 S.W. 2d 359, 361 (Mo. 1963); and *Newman v. Twin City State Bank*, 649 S.W.2d 524, 529 (Mo. App. 1983).

(D) INDIVIDUAL UNION OFFICIALS' LIABILITY FOR BREACH OF DUTY OF FAIR REPRESENTATION

Plaintiffs seek to hold specific Local 453 and International union officials liable for the alleged discriminatory acts. Plaintiffs allege that the local business manager, defendant Moore, now a vice-president with the International union and an International representative, defendant Tutorino, denied the plaintiffs equal opportunities through the hiring hall operated by the Local. Plaintiffs do not allege that the defendant officials were acting in their individual capacities outside the scope of their duties. Plaintiffs contend that the discriminatory practices continued after defendant Moore left his position as business agent of Local 453 by succeeding business agents.

It is well settled law that individual officers and members are normally not responsible for damages in both breach of collective bargaining agreements and in breach of the duty of fair representation actions. *Atkison v. Sinclair Refining Co.*, 370 U.S. 476 (1962); *General Dynamic Corporation v. Local 5, Ind. U. of Marine*, 469 F.2d 848 (1st Cir. 1972); *Fox v. Mitchell Transport, Inc.*, 506 F.Supp. 1346 (D. Md. 1981), aff'd, 671 F.2d 498 (4th Cir. 1982); *Suwanchai v. IBEW*, 528 F.Supp. 851 (D. N.H. 1981); *Navajo Freight Lines, Inc. v. Teamsters Local 961*, 306 F.Supp. 536 (D. Colo. 1968). Plaintiffs have failed to allege any acts which would give rise to a cause of action against the individual officers of both Local 453 and the International union.

(E) 42 U.S.C. § 1983 ACTIONS

Counts II and III both allege that the defendants conspired with an individual named Randy Glessner, allegedly a deputy sheriff of Ash Grove, Missouri, to have plaintiff Rodman arrested and jailed on or about September 2, 1978.

The only incident mentioned in both Counts II and III is the incident involving Glessner (Nolon Depo. pp. 194-195).

It is well established that two elements are necessary in order to establish a claim under § 1983. First, the conduct complained of must have been engaged in under color of state law. Second, such conduct must have infringed upon the rights, privileges or immunities secured to the complaining party by the Constitution or laws of the United States. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970); and *Wallace v. Cannon*, 357 F.2d 557 (8th Cir. 1966). If a conspiracy is alleged, the plaintiff must establish a sufficiently close nexus between the state action and the private entity. *Graseck v. Mauceri*, 582 F.2d 203, 209 (2d Cir. 1978). General conclusory allegations unsupported by facts are insufficient to constitute a cause of action under the Civil Rights Act. *Grow v. Fisher*, 523 F.2d 875 (7th Cir. 1975). Plaintiffs must show with specificity the acts of conspiracy between the state and private individuals. *Barnes v. Dorsey*, 480 F.2d 1057 (8th Cir. 1973); *Life Ins. of North America v. Reichardt*, 591 F.2d 499 (9th Cir. 1979). Respondeat superior does not apply to § 1983 actions. *Monell v. New York City Dept. of Social Services*, 436 U.S. 658 (1978); *Doores v. McNamara*, 476 F.Supp. 987 (W.D. Mo. 1979). The language of § 1983 requires a degree of causation as an element of individual liability. *Sebastian v. United States*, 531 F.2d 900 (8th Cir. 1976); *Univ. of Missouri v. Dalton*, 456 F.Supp. 985 (W.D. Mo. 1978); *Doores v. McNamara*, 476 F.Supp. 987 (W.D. Mo. 1979).

Officer Glessner was dismissed as a defendant to the suit due to lack of service. The alleged incident occurred some five years ago and to this date plaintiffs have been unable to locate Officer Glessner. Unfortunately, plain-

tiffs have failed to come forward with any facts connecting the wrongful acts of Officer Glessner with the defendants. Plaintiffs' counsel admitted in oral argument that insufficient facts exist at this time to proceed with the § 1983 conspiracy.

II. PLAINTIFFS' MOTION TO AMEND COMPLAINT

The standard for evaluating plaintiffs' motion to amend complaint was initially stated in *Foman v. Davis*, 371 U.S. 178 (1962). The *Foman* court stated the general criteria as follows:

> Rule 15(a) declares that leave to amend "shall be freely given when justice so requires;" this mandate is to be heeded. [citations omitted]. If the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits. In the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment, futility of amendment, etc.—the leave sought should, as the rules require, be "freely given." Of course, the grant or denial of an opportunity to amend is within the discretion of the [trial court]. . . .

Id. at 182. Plaintiffs seek to amend their complaint by adding Counts V, VI and VII which in essence address all prior facts as contained in the complaint [Counts I and IV] originally filed in August of 1980 as an action arising under the Labor Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 411(a)(5). Plaintiffs

allege that the hiring hall discrimination and fines imposed upon them resulted in their denial of a full and fair hearing prior to the imposition of disciplinary action being taken against them.

The district court has concurrent jurisdiction with the NLRB in actions arising under the LMRDA, § 411 (a)(5) actions. *Vandeventer v. Local Union No. 513*, 579 F.2d 1373, 1377 (8th Cir. 1978). Although such an amendment would solve plaintiffs' jurisdictional problems, the Court is of the opinion after balancing the interests and nature of this action that the plaintiffs' motion to amend the complaint should be denied.

Plaintiffs insist that they should be allowed leave to amend their complaint because initially they received assistance from the National Right to Work Legal Defense Foundation which would have denied them assistance if they had proceeded under the Landrum-Griffin Act. In addition, plaintiffs contend that the Supreme Court's recent decision of *Del Costello v. International Brotherhood of Teamsters*, ... U.S. ....., 51 U.S.L.W. 4693 (June 8, 1983) would effectively time bar Counts I and IV alleging breach of the union's duty of fair representation. In passing upon this motion, the Court is obligated to consider several factors with justice to both sides being the ultimate criteria. *Buder v. Merrill Lynch, Pierce, Fenner & Smith*, 486 F.Supp. 54, 55 (E.D. Mo. 1980). Although leave to amend should be freely granted when necessary to establish jurisdiction as may be the case under the plaintiffs' present theories, *Shows v. Harber*, 575 F.2d 1253, 1255 (8th Cir. 1978); and *United Steelworkers of America v. Mesher Brothers Industries, Inc.*, 457 F.2d 91, 93 (8th Cir. 1972), this is certainly not the sole criteria for such a decision. The balance of justice requires considering the following nonexclusive factors: extent of time delay,

necessity for continued discovery, possible futility of the amendment, possible prejudice to the parties, variance of the legal facts and issues, movant's prior knowledge of facts underlying the proposed amendments, and movant's viable excuses. *Zenith Radio Corp. v. Hazeltin Research,* 401 U.S. 321, 330-332 (1971); *Svoboda v. Tran Co.,* 655 F.2d 898, 900 (8th Cir. 1981); *Tatum v. Frisco Transportation Co.,* 626 F.2d 55, 56 (8th Cir. 1980); and *Shows v. Harber,* 575 F.2d 1253, 1255 (8th Cir. 1978).

The present case has been on file for three years and the plaintiffs have brought their motion for leave to amend within two months of the trial setting and four weeks after defendants filed motions for summary judgment. The facts alleged within plaintiffs' original complaint were known to the plaintiffs approximately two to three years prior to the filing of their original complaint. In fact, these very claims have been the subject of extensive litigation before the NLRB. (*Supra,* discussion on subject matter jurisdiction under the duty of fair representation). This Court has been subject to numerous motions and proceedings relative to the specific theories upon which the plaintiffs originally proceeded. The defendants, as well as the plaintiffs, are entitled to a speedy and inexpensive trial. *Buder,* 486 F.Supp. at 55. Both sides have taken extensive discovery by interrogatories and depositions. Of major importance is the fact that the plaintiffs have received substantial relief in prior proceedings before the NLRB. In addition, there is some doubt as to whether this amended complaint would survive a motion for summary judgment on the above-stated grounds.

There appears to be numerous examples of where motions to amend have been denied on much less criteria than those existing in the case at bar. *See, Izaak Walton*

League of America v. St. Clair, 497 F.2d 849 (8th Cir. 1974); *Mende v. Dun & Bradstreet, Inc.*, 67 F.2d 129 (9th Cir. 1982). Given the weighty considerations in favor of denying plaintiffs' motion to amend, the movant has failed to bear the burden in showing some justification for their delay. *Frank Adam Electric Co. v. Westinghouse Electric and Manufacturing Co.*, 146 F.2d 165, 167 (8th Cir. 1945).

III. PLAINTIFFS' MOTION TO DISMISS COMPLAINT WITHOUT PREJUDICE

Shortly after the defendants filed their various motions for summary judgment, plaintiffs filed their motion to dismiss their complaint without prejudice. Said motion was filed prior to their response to the defendants' motions for summary judgment. After careful consideration, the Court is of the opinion that the plaintiffs' motion to dismiss without prejudice should be denied due to the equitable considerations given the positions of all parties.

It is within this Court's judicial discretion to balance the equities among the parties. Normally, the motion to dismiss without prejudice should be granted unless the opposing party would suffer judicial prejudice. *Williams v. Ford Motor Credit Co.*, 627 F.2d 158, 159 (8th Cir. 1980); *Hoffmann v. Alside, Inc.*, 596 F.2d 822, 823 (8th Cir. 1979); and *New York, C & St. L. R. Co. v. Vardaman*, 181 F.2d 769, 771 (8th Cir. 1950). In determining the equities of a motion to dismiss without prejudice, the Court is bound to consider such factors as: undue vexatiousness, the length of the proceeding, extensive pretrial preparation by the parties and the Court; undue burden to the litigants in presenting their defense, excessive and duplicatious expense of possible second litigation, the extent to which the current suit has progressed, and the prejudice the plaintiffs may suffer in denial of the motion. *Williams*, 627 F.2d at

159; *Homeowners Loan Corporation v. Huffman,* 134 F.2d 314, 317 (8th Cir. 1943) and *Manners v. Fawcett Publications, Inc.,* 85 F.R.D. 63, 65 (S.D. N.Y. 1979).

Plaintiffs contend that the motion should be granted because (1) recent Supreme Court decisions have prejudiced their case by either time barring their claims or denying them a cause of action, (2) back pay proceedings are still proceeding before the NLRB and therefore this Court will be unable to decide upon the proper attorney fees and expenses in the case at bar, and (3) plaintiffs are still unable to ascertain the whereabouts of the alleged officer who acted under state power in denying plaintiff Rodman his civil rights under § 1983 as alleged in Counts II and III. Defendants counter these suggestions by pointing out that it has been five years since the alleged incident took place which gave rise to the § 1983 action and that plaintiffs have yet to ascertain the whereabouts of Officer Glessner. In addition, there have been several NLRB proceedings in which the Board has granted substantial relief to the plaintiffs. There has been extensive pretrial activity including numerous motions, interrogatories, and depositions. Numerous man-hours have been spent in preparing this case for trial and the motion to dismiss was filed some three weeks after defendants filed their motions for summary judgment and within two months of trial. The Court is unable to justify the dismissal and under the circumstances, the dismissal without prejudice would not facilitate the orderly and swift administration of justice and would "preclude the relatively rapid final resolution of labor disputes favored by federal law." *Del Costello v. International Brotherhood of Teamsters,* ..... U.S. ....., 51 U.S.L.W. 4693, 4698 (June 8, 1983).

For the above reasons, it is hereby

ORDERED that plaintiffs' motion for leave to amend their complaint and motion to dismiss without prejudice are denied; and it is further

ORDERED that defendants' motions for summary judgment are granted; and it is further

ORDERED that all costs are to be incurred by the plaintiffs.

/s/ Russell G. Clark
Russell G. Clark, Chief Judge
United States District Court

Dated: September 16, 1983

APPENDIX C

(Filed August 13, 1984)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-2384

September Term, 1983

Bill Rodman, et al,

Appellants,

v.

Jim W. Hensley,

Appellees.

Appeal from the United States District Court
for the Western District of Missouri

JUDGMENT

This appeal from the United States District Court was submitted on the record of the said District Court and the briefs of the parties.

Upon consideration it is hereby ordered and adjudged that the judgment of the District Court is affirmed in accordance with the opinion of this court.

August 13, 1984

Costs taxed in favor of appellees:

Costs of Appellee, Intl. Brotherhood of Electrical Workers, Local Union No. 53 for briefs for recovery from Appellants: $141.60

Costs of Appellees, Intl. Brotherhood of Electrical Workers, AFL-CIO, Jack F. Moore and Carl Tutorino, for briefs for recovery from Appellants: $129.77

Order entered in accordance with opinion

/s/ Robert D. St. Vrain
Clerk, U. S. Court of Appeals, Eighth Circuit

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-2384-WM

September Term, 1984

BILL RODMAN, ET AL.,

Appellants,

vs.

JIM W. HENSLEY, ET AL.,

Appellees.

Appeal from the United States District Court for the
Western District of Missouri

Appellants' petition for rehearing has been considered by the Court and is hereby denied.

October 26, 1984

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 83-2384-WM

September Term, 1984

BILL RODMAN, ET AL.,

Appellants,

vs.

JIM W. HENSLEY, ET AL.,

Appellees.

Appeal from the United States District Court for the
Western District of Missouri

Appellants' motion to reconsider petition for rehearing, with suggestion for reconsideration en banc is hereby denied.

November 28, 1984

APPENDIX F

Rule 15 of the Federal Rules of Civil Procedure provides in part, as follows:

"**(a) Amendments.** A party may amend his pleading once as a matter of course at any time before a responsive pleading is served * * *. Otherwise, a party may amend his pleading only by leave of Court or by written consent of the adverse party; and leave shall be freely given when justice so requires. * * *"

"**(b) Amendments to Conform to Evidence.**

* * *

"**(c) Relation Back of Amendment.** Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. * * *

"**(d) Supplemental Pleadings.** Upon Motion of a party the Court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the Court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor."

APPENDIX G

(Provisions of 29 U.S.C. §§ 411, 412, 529, as printed in 29 USCS §§ 411, 412, 529)

BILL OF RIGHTS OF MEMBERS OF LABOR ORGANIZATIONS

§ 411. Bill of rights; constitution and bylaws of labor organizations

(a)(1) **Equal rights.** Every member of a labor organization shall have equal rights and privileges within such organization to nominate candidates, to vote in elections or referendums of the labor organization, to attend membership meetings, and to participate in the deliberations and voting upon the business of such meetings, subject to reasonable rules and regulations in such organization's constitution and bylaws.

(2) Freedom of speech and assembly. Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: Provided, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations.

(3) Dues, initiation fees, and assessments. Except in the case of a federation of national or international

labor organizations, the rates of dues and initiation fees payable by members of any labor organization in effect on the date of enactment of this Act [enacted Sept. 14, 1959] shall not be increased, and no general or special assessment shall be levied upon such members, except—

(A) in the case of a local labor organization, (i) by majority vote by secret ballot of the members in good standing voting at a general or special membership meeting, after reasonable notice of the intention to vote upon such question, or (ii) by majority vote of the members in good standing voting in a membership referendum conducted by secret ballot; or

(B) in the case of a labor organization, other than a local labor organization or a federation of national or international labor organizations, (i) by majority vote of the delegates voting at a regular convention, or at a special convention of such labor organization held upon not less than thirty days' written notice to the principal office of each local or constitutent labor organization entitled to such notice, or (ii) by majority vote of the members in good standing of such labor organization voting in a membership referendum conducted by secret ballot, or (iii) by majority vote of the members of the executive board or similar governing body of such labor organization, pursuant to express authority contained in the constitution and bylaws of such labor organization: Provided, That such action on the part of the executive board or similar governing body shall be effective only until the next regular convention of such labor organization.

(4) Protection of the right to sue. No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: Provided, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: And provided further, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition.

(5) Safeguards against improper disciplinary action. No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

(b) Invalidity of constitution and bylaws. Any provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect.

(Sept. 14, 1959, P. L. 86-257, Title I, § 101, 73 Stat. 522.)

§ 412. Civil action for infringement of rights; jurisdiction

Any person whose rights secured by the provisions of this title [29 USCS §§ 411 et seq.] have been infringed by any violation of this title [29 USCS §§ 411 et seq.] may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

(Sept. 14, 1959, P. L. 86-257, Title I, § 102, 73 Stat. 523.)

§ 529. Prohibition on certain discipline by labor organization

It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this Act. The provisions of section 102 [29 USCS § 412] shall be applicable in the enforcement of this section.

(Sept. 14, 1959, P. L. 86-257, Title VI, § 609, 73 Stat. 541.)

APPENDIX H

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
CHARGE AGAINST LABOR ORGANIZATION
OR ITS AGENTS

INSTRUCTIONS: File an original and 3 copies of this charge and an additional copy for each organization, each local and each individual named in item 1 with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occurring.

Do Not Write in This Space
Case No. 17-CB-1921
Date Filed May 8, 1978

1. Labor Organization or Its Agents Against Which Charge Is Brought

a. Name International Brotherhood of Electrical Workers Local Union No. 453

b. Union Representative to Contact Jim W. Hensley

c. Phone No. 869-7251

d. Address (Street, city, State and ZIP code) 2902 East Division, Springfield, Missouri 65803

e. The above-named organization(s) or its agents has (have) engaged in and is (are) engaging in unfair labor practices within the meaning of section 8(b), subsection(s) (List Subsections) (1)(A) & (2) of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the Act.

2. Basis of the Charge (Be specific as to facts, names, addresses, plants involved, dates, places, etc.)

Subject union through its agents, Jim W. Hensley and J. Danner and others have since 6 months prior to the filing hereof, and are continuously thereafter violating the rights of Bill Rodman, Larry J. Nolan, and other journeymen electricians who have sought to be referred to jobs or employment through the subject unions' hiring hall procedure, in the following respects:

(1) By wrongfully refusing to permit said journeymen electricians including Rodman and Nolan to register on the Group 1 hiring hall list or to continue working on jobs after being lawfully referred to said jobs,

(2) By refusing to permit said individuals to have full knowledge and information with respect to the hiring hall procedures and the position of said individuals on said hiring hall list and by refusing to list them on the Group 1 list for which they qualified,

(3) Have breached their duty of fair representation to the said employees and prospective employees by failing to fairly operate the hiring hall procedures and using the hiring hall procedures to discriminate against persons who are not members of Local 453 or persons who have expressed disagreement with the manner in which the Local 453 hiring hall has been run,

(4) By threatening to take reprisals against the said Rodman and Nolan and other employees if they did not voluntarily quit jobs to which they had previously been referred to make room for Local 453 members, and by threatening to pull the work permits of said individuals if they did not quit their jobs for that purpose,

(5) Subject union and its agents have unlawfully and discriminatorily administered the hiring hall procedures by causing employers to refuse employment to said individuals, including Rodman and Nolan and have

forced said individuals including Rodman and Nolan to quit their jobs and thereby cause their constructive discharge from employment by Sachs Electric Company, P. O. Box 96, St. Louis, Missouri 63166, on the Fort Leonard Wood job.

(6) And subject union and its agents have in the past and are continuing to threaten reprisals against Rodman, Nolan and other employees or prospective employees to prevent them from being able to file charges with the NLRB to protect their rights under the law and have threatened to blacklist said individuals so that they cannot have further work opportunities in the Local 453 jurisdiction, and have subjected said employees to internal union charges, and are threatening to file further charges against said employees, and

(7) By the above and other acts and conduct, subject union and its agents have threatened, coerced and restrained employees in violation of their rights and caused them to be discriminated against by employers and refused employment in violation of their rights under the statutes aforesaid and under Section 7 of the Act.

3. Name of Employer Kansas City Chapter, NECA

4. Phone No. 816/753-7444

5. Location of Plant Involved (Street, city, State and ZIP code) Southwest Missouri area

6. Employer Representative to Contact Bob Haines

7. Type of Establishment (Factory, mine, wholesaler, etc.) electrical construction

8. Identify Principal Product or Service electrical construction

9. No. of Workers Employed 200

10. Full Name of Party Filing Charge Donald W. Jones

11. Address of Party Filing Charge (Street, city, State and ZIP code) 110 Landmark Building, Springfield, Missouri 65806

12. Telephone No. 862-9255

13. Declaration

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By /s/ Donald W. Jones
Donald W. Jones
(Signature of representative or person making charge)

Attorney
(Title of office, if any)

Address 110 Landmark Building
Springfield, Missouri 65806

862-9255
(Telephone number)

May 5, 1978
(Date)

Willfully False Statements on This Charge Can Be Punished by Fine and Imprisonment (U.S. Code, Title 18, Section 1001)

Office - Supreme Court, U.S.
FILED
MAR 15 1985
ALEXANDER L. STEVAS
CLERK

No. 84-1263

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

BILL RODMAN, LARRY NOLAN AND SAMUEL MILLER, individually and as representatives of a class of persons who are qualified journeymen electricians and inside wiremen residing in Southwest Missouri who are not members of IBEW Local 453, but who have worked out of or sought to work out of the IBEW Local 453 referral or hiring hall or who have worked under collective bargaining agreements negotiated and administered by IBEW Local 453, during and since 1976,

Petitioners,

v.

JIM W. HENSLEY, MICHAEL BRUMLEY, GENE MCGHEE, PAT SHANKS, J.L. SMITH, JOHN D. PRICE, J.C. DANNER, R.D. PORTER, ROGER TESTERMAN, DENNIS ASHCRAFT, LEROY STILLEY, JACK F. MOORE, CARL TUTORINO, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, and LOCAL UNION 453, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MEMORANDUM FOR RESPONDENTS IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-1263

BILL RODMAN, LARRY NOLAN AND SAMUEL MILLER, individually and as representatives of a class of persons who are qualified journeymen electricians and inside wiremen residing in Southwest Missouri who are not members of IBEW Local 453, but who have worked out of or sought to work out of the IBEW Local 453 referral or hiring hall or who have worked under collective bargaining agreements negotiated and administered by IBEW Local 453, during and since 1976,

Petitioners,

v.

JIM W. HENSLEY, MICHAEL BRUMLEY, GENE MCGHEE, PAT SHANKS, J.L. SMITH, JOHN D. PRICE, J.C. DANNER, R.D. PORTER, ROGER TESTERMAN, DENNIS ASHCRAFT, LEROY STILLEY, JACK F. MOORE, CARL TUTORINO, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, and LOCAL UNION 453, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MEMORANDUM FOR RESPONDENTS IN OPPOSITION [1]

[1] This brief is filed on behalf of all respondents. In this brief the Petition for Certiorari will be referred to as "Pet."; the Appendix to the Petition will be referred to as "Pet. App."; and the Joint Appendix filed with the United States Court of Appeals for the Eighth Circuit will be referred to as "J.A."

STATEMENT OF THE CASE

Because the Statement of the Case in the Petition for Certiorari is to a large extent inaccurate, and at times incoherent, respondents will as briefly as possible describe the procedural history of this case and the relevant facts.

A. Procedural History Of This Litigation

This action was filed on August 29, 1980. (J.A. 13-23) The complaint consisted of four counts and had three named plaintiffs, Bill Rodman, Larry Nolon, and Sam Miller. Counts One and Four sought relief for breach of the duty of fair representation under 29 U.S.C. § 185 and 28 U.S.C. § 1337. Counts Two and Three sought relief under the Civil Rights Act of 1871, 42 U.S.C. §§ 1983, 1985, and 1988. Counts Three and Four also sought relief under unspecified theories of "Missouri common law."

Named as defendants were Local 453 of the International Brotherhood of Electrical Workers ("the Local"), the International Brotherhood of Electrical Workers, AFL-CIO ("the International"), and several individuals. Defendant Jack Moore is an International Vice-President of the IBEW, and defendant Tutorino is a member of Moore's staff. The other individual defendants are all either officers, former officers and/or members of the Local.

The defendants (respondents here) filed motions to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure which were granted in part on September 28, 1981. (J.A. 33-39) In that order the court limited the scope of the claims brought under the Civil Rights Act and also declined to exercise its pendent jurisdiction to hear plaintiffs' (petitioners here) state law claims. (J.A. 38) The court stated that it could not "determine whether it [had] the power to exercise the discretion to hear the plaintiffs' state claims since the

complaint does not attempt to set forth the state theories of recovery upon which plaintiffs intend to proceed". *Id.* The court added that it "cannot see or assume a relationship between plaintiffs' Missouri common law rights" and plaintiffs' federally-based claims. *Id.*

On August 6, 1982, the district court struck the class action allegations of Counts Two and Three. (J.A. 76) The court predicated its action on the fact that during the two years in which the case had been filed, petitioners had made no motion to certify the class nor conducted any discovery designed to demonstrate that the case should properly proceed as a class action.

Following extensive discovery, respondents filed summary judgment motions on July 1, 1983. Before responding to these motions, on August 4, 1983, the petitioners filed a motion for leave to file an amended complaint. They sought to add three new counts based upon the Labor-Management Reporting and Disclosure Act (LMRDA), 29 U.S.C. § 401, *et seq.* (J.A. 304-316) In their suggestions in support of this motion, petitioners explained to the court that at the time the complaint was filed they had made a conscious decision not to raise any LMRDA claims, but that they now wished to change that decision.

On September 16, 1983, the District Court granted summary judgment to respondents (Pet. App. A4-A22) stating that:

> It is obvious from the pleadings and supporting affidavits that defendants' motions for summary judgment can be granted on numerous alternative theories.

(Pet. App. A6) The District Court held, *inter alia*, that the claims for breach of the duty of fair representation in Counts One and Four were barred by the six-month statute of limitations in Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b). (Pet. App.

A7-A8) The court also denied petitioners' motion for leave to file an amended complaint. (Pet. App. A17-A20)

Petitioners appealed but did not contest the dismissal of their claims under the Civil Rights Act. The Eighth Circuit affirmed on August 13, 1984, on the basis that petitioners' fair representation claims were clearly time-barred. (Pet. App. A1-A3) Petitioners' Petition for Rehearing was denied on October 26, 1984. (Pet. App. A25) A "motion to reconsider petition for rehearing" was denied on November 28, 1984. (Pet. App. A26)

B. Relevant Facts

Petitioners Bill Rodman and Sam Miller are members of Local Union 11 of the International Brotherhood of Electrical Workers, which is located in Los Angeles, California. Petitioner Larry Nolon is a member of Local 728 of the International Brotherhood of Electrical Workers, which is located in Ft. Lauderdale, Florida.

Local 453 of the International Brotherhood of Electrical Workers is headquartered in Springfield, Missouri, and its jurisdiction includes portions of southwest and central Missouri. At various times each of the three petitioners has sought employment through the hiring hall operated by Local 453 and governed by the collective bargaining agreements entered into by Local 453.

The referral procedure utilized by Local 453's hiring hall is set forth in the collective bargaining agreement between Local 453 and the Springfield Division, Kansas City Chapter of the National Electrical Contractors Association, Inc. (NECA). (See Attachment B to the Appendix to the International Brotherhood of Electrical Workers' motion for summary judgment, filed July 1, 1983.) That collective bargaining agreement establishes four separate categories for employment referral. Applicants who qualify for higher groups are referred to jobs before those on the lower groups. Those in Group I, which receive the highest priority, include journeyman

wiremen with at least four years' experience in the trade, who live in the appropriate geographical area and who have worked for at least one year in the previous four under an agreement between Local 453 and NECA. Group II includes all journeymen wiremen with four or more years' experience in the trade. Group III includes all those with at least two years experience in the trade, living in the appropriate geographical area who have worked at least six months in the last three years under an agreement between Local 453 and NECA. Group IV includes all those who have worked at the trade for at least one year.[2]

The collective bargaining agreement also contains a non-discrimination clause. The contract states:

> The Union shall select and refer applicants for employment without discrimination against such applicants by reason of membership or non-membership in the Union and such selection and referral shall not be affected in any way by rules, regulations, by-laws, constitutional provisions or any other aspect or obligation of union membership policies or requirements.

The agreement also establishes a grievance procedure available to all employees and applicants for referral, under which complaints regarding the administration of the hiring hall are considered by an Appeals Committee consisting of a union representative, an employer representative and a public member.

On or about February 28, 1978, Rodman and Nolon met with International Vice-President Moore at his office in Springfield, Missouri. Rodman and Nolon complained that Jim Hensley, [illegible] Business Manager of Local 453 at the time, had refused to allow Nolon and Rodman to

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[2] The Petition for Certiorari incorrectly describes the referral procedure as one in which only members of Local 453 are permitted to register for Group I and Group II is for members of other Locals. (Pet. 4)

register for Group I for which both Rodman and Nolon felt they qualified. Moore asked Rodman and Nolon to put their complaints in writing, which they did in separate letters dated March 2, 1978. Moore responded in writing on March 6, 1978, advising Rodman and Nolon of the existence of the grievance procedure in the collective bargaining agreement, and suggesting they pursue their complaint by filing a grievance with the Appeals Committee. (J.A. 254, 255) Rodman and Nolon did file a complaint or grievance with the Appeals Committee on April 21, 1978. After a hearing, the Appeals Committee issued a decision on July 3, 1978 holding that Rodman and Nolon should be permitted to register for Group I, and both were thereafter allowed to register for that Group. (J.A. 220-225)

Rodman filed a second grievance with the Appeals committee on June 15, 1979. This grievance challenged a rule promulgated by Local 453 requiring individuals to return to Local 453's jurisdiction every two weeks to re-sign the hiring hall registry. An arbitration decision issued on October 8, 1979 found no evidence of discrimination and held that the grievance was moot because Local 453 had already abandoned the challenged rule. (J.A. 220-221, 227-233)

Rodman filed a third grievance on March 7, 1980. In that grievance Rodman claimed that the hiring hall had subjected him to discrimination in job referrals during January, February and March of 1980. The Appeals Committee found no evidence to support Rodman's charge of discrimination and denied his grievance. (J.A. 234-239) This decision issued on or about January 22, 1981. (J.A. 220-221)

Larry Nolon did not file any grievances with the Appeal Committee other than the original grievance filed with Rodman's in April of 1978. (Nolon Depo., pp. 80-81) Nolan made no attempt to register for Group I or obtain a referral to employment from Local 453's hiring

hall after July or August of 1979. (Nolon Depo., p. 35, 219) Any claim of discrimination made by Nolon regarding the administration of Local 453's hiring hall was based upon events which occurred prior to August 13, 1979. (Nolon Depo., p. 219)

Samuel Miller never filed a grievance with the Appeals Committee. He requested the right to register for Group I in March of 1979 and was allowed to do so later that month. (See generally, Miller Depo., pp. 13-16).

To a large extent, the actions challenged by the plaintiffs in this case were also the subject of three separate unfair labor practice complaints which were ruled upon by the National Labor Relations Board and the Eighth Circuit. These cases resulted in orders remedying those actions deemed unlawful and prohibiting any future occurrence. As the district court stated in this case:

> Three cases before the NLRB have dealt extensively with the conduct sought to be restricted in the case at bar: *Sachs Electric, Donald Jones and IBEW, Local Union 453*, Case No. 17-CB-1921 (1980), 248 NLRB No. 92, 104 LRRM 1070 enf'd as modified, 668 F.2d 991, 109 LRRM 2524 (8th Cir. 1982); *IBEW Local 453 and Southern Sun Electric Corp.*, Case No. 17-CB-2192 (1982); and *IBEW, Local 453 and Bill Rodman*, Case No. 17-CB-2269, 258 NLRB No. 195, 108 LRRM 1221 (1981), enfd 696 F.2d 999, 112 LRRM 2896 (8th Cir. 1982). All three actions resulted in extensive protective orders being issued that would effectively protect plaintiffs' rights as guaranteed by the NLRA.

(Pet. App. A11)

ARGUMENT

The United States Court of Appeals for the Eighth Circuit in this case applied the six-month limitation period of Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), to the petitioners' duty of fair representation claim, as required by this Court's decision in *DelCostello v. Teamsters*, 462 U.S. 151 (1983). The court of appeals applied the six-month limitation period despite the fact that petitioners' suit was filed before *DelCostello* was decided. In that respect, the decision below is consistent with the overwhelming majority of courts of appeals which, with only one exception, have applied the holding in *DelCostello* to such suits. *Smith v. General Motors Corp.*, 747 F.2d 372 (6th Cir. 1984); *Graves v. Smith's Transfer Corp.*, 736 F.2d 819 (1st Cir. 1984); *Welyczko v. U.S. Air, Inc.*, 733 F.2d 239 (2d Cir.), *cert. denied*, 53 U.S.L.W. 3403 (1984); *Murray v. Branch Motor Express Co.*, 723 F.2d 1146 (7th Cir. 1983), *cert. denied*, 53 U.S.L.W. 3289 (1984); *Lincoln v. District 9 Machinists*, 723 F.2d 627 (8th Cir. 1984); *Rogers v. Lockheed-Georgia Co.*, 720 F.2d 1247 (11th Cir. 1983); *cert. denied*, 53 U.S.L.W. 3289 (1984); *Perez v. Dana Corp.*, 718 F.2d 581 (3d Cir. 1984); *Edward v. Sea-Land Service, Inc.*, 720 F.2d 857 (5th Cir. 1983); *Ernst v. Indiana Bell Telephone Co.*, 717 F.2d 1036 (7th Cir. 1983), *cert. denied*, 52 U.S.L.W. 3509 (1984). *Contra, Barina v. Gulf Trading & Transportation Co.*, 726 F.2d 560 (9th Cir. 1984). And, as the foregoing citations demonstrate, this Court has on several occasions considered whether the conflict caused by the Ninth Circuit's erroneous, contrary view requires resolution by the Court and has determined that the issue is not of sufficient importance to support a grant of certiorari.

Apparently, recognizing that no basis exists for granting a petition for certiorari on the central issue presented by the Eighth Circuit's decision in this case, petitioners have raised a series of peripheral issues in an attempt by

sheer volume to create an appearance of substance. But those issues generally turn on the specific facts of this case or the manner in which the district court chose to exercise its discretion. No important questions of federal law are presented, and no conflict exists with decisions of other courts of appeals on any of these issues. Accordingly this Court should deny the petition for a writ of certiorari.

1. The petitioners first argue that the Eighth Circuit incorrectly applied *DelCostello* because this action is a duty of fair representation suit against a labor organization rather than a "hybrid" duty of fair representation/breach of contract action against both a labor organization and an employer. (Pet. 13) Yet this Court's decision in *DelCostello* is not limited to "hybrid" suits, and no court has ever declined to apply *DelCostello* to a duty of fair representation suit against only a union. Indeed at least two courts of appeals have applied *DelCostello* to such suits.

In *DelCostello* this Court reviewed two suits in which plaintiffs had sued a union for breach of the duty of fair representation and an employer for breach of the collective bargaining agreement. The Court in *DelCostello* held "that § 10(b) [of the National Labor Relations Act] should be the applicable statute of limitations governing the suit, both against the employer and against the union." *Id.* at 155. The first and foremost reason for adopting Section 10(b) as the applicable statute of limitations was the similarity between an unfair labor practice and a breach of the duty of fair representation:

> The NLRB has consistently held that all breaches of a union's duty of fair representation are in fact unfair labor practices. . . . Even if not all breaches of the duty are unfair labor practices, however, the family resemblance is undeniable, and indeed there is a substantial overlap. Many fair representation claims (the one in No. 81-2386, for example) include

> allegations of discrimination based on membership status or dissident views, which would be unfair labor practices under § 8(a)(1) or (2). Aside from these clear cases, duty-of-fair-representation claims are allegations of unfair, arbitrary, or discriminatory treatment of workers by unions—as are virtually all unfair labor practice charges made by workers against unions.

Id. at 170. The Court did not limit its decision to "hybrid" duty of fair representation/breach of contract suits. The Court acknowledged that an employee could choose to sue either a union or employer separately and emphasized the need for consistency and avoiding "knotty problems of categorization and consistency." *Id.* at 165, 166 n.16.

The similarity of a duty of fair representation suit to an unfair labor practice case is, if anything, even stronger in a suit based only upon the duty of fair representation. In *DelCostello* this Court adopted Section 10(b) because "[m]any fair representation claims . . . include allegations of discrimination based on membership status or dissident views, which would be unfair labor practices." *Id.* at 170. In this case petitioners' fair representation claims include allegations of discrimination based on membership status and dissident views which to a large extent already have been litigated before the NLRB and the Eighth Circuit in unfair labor practice cases. Thus no logical basis exists for arguing that the statute of limitations deemed applicable in *DelCostello* is inapplicable here.

At least two other courts of appeals have reached the same conclusion. In *Erkins v. Steelworkers*, 723 F.2d 837 (11th Cir. 1984) the Eleventh Circuit rejected the argument that the six-month limitation period applied only to "hybrid" actions. The court acknowledged that the "similarity of rights and considerations [upon which *DelCostello* was based] exists even more clearly when a claim-

ant brings only a breach of duty of fair representation claim against a union." *Id.* at 838. In addition, the Seventh Circuit has applied *DelCostello* in two duty of fair representation actions which did not include breach of contract claims against employers. *Lewis v. Laborers Local 100*, —— F.2d ——, 118 LRRM 2146 (7th Cir. 1984); *Freeman v. Local 135, Teamsters*, 746 F.2d 1316 (7th Cir. 1984).

Moreover, no court has ever declined to apply *DelCostello* in a duty of fair representation suit because that suit did not include a breach of contract claim. In support of their argument petitioners cite a district court decision, *Gordon v. Winpisinger*, 581 F. Supp. 234 (E.D.N.Y. 1972) which does state that *DelCostello* applies only to "hybrid" actions. *Gordon*, however, involved an alleged violation of the Labor-Management Reporting and Disclosure Act, 29 U.S.C. § 401 *et seq.*, rather than a breach of the duty of fair representation. The district court's brief (and inaccurate) characterization of *DelCostello* in that context hardly creates a conflict among the courts of appeals or raises an important question of federal law.

2. In a second attempt to avoid the application of the six-month limitation period required by *DelCostello*, petitioners argue that this case involves a continuing violation of the duty of fair representation which is not barred by any statute of limitations. (Pet. 13-18) Petitioners contend that the decision of the Eighth Circuit conflicts with *Lewis v. Laborers Local 100*, —— F.2d ——, 118 LRRM 2146 (7th Cir. 1984), in which the Seventh Circuit held that a duty of fair representation claim based upon hiring hall discrimination was improperly dismissed. Yet an examination of *Lewis* shows that no conflict exists. Moreover, whether a particular case presents a continuing violation is a fact-specific determination in each case which has little effect other than on the parties to that case. Such determinations do not present important questions of federal law.

In their discussion of *Lewis* the petitioners ignore the crucial procedural distinction between that case and this one. In *Lewis* the district court granted, on statute of limitations grounds, defendants' motion to dismiss the plaintiff's duty of fair representation claim alleging hiring hall discrimination. The Seventh Circuit reversed because the complaint had alleged that the plaintiff had been subjected to discrimination "since February 1980" and, on a motion to dismiss, the court could not consider facts other than those alleged in the complaint. Because the plaintiff had alleged a continuing violation, granting a motion to dismiss on statute of limitations grounds was improper. The Seventh Circuit, however, expressly acknowledged that dismissal might be appropriate at a later stage in the case if the district court found that no breach of the duty of fair representation occurred within the applicable six-month limitation period:

> Notwithstanding the foregoing analysis, we hold only that Lewis' complaint should not have been disposed of on a motion to dismiss.
>
> * * * *
>
> Thus, we hold that Lewis has alleged a continuing violation sufficient to toll the statute of limitations at least until March 23, 1982. Nonetheless, on remand the district court may find that the continuing violation stopped prior to six months before the original complaint was filed. If the court so finds, the action is time-barred.

Id. at 2155.

The instant case was *not* disposed of on a motion to dismiss. The court granted a motion for summary judgment which followed several years of extensive discovery. The district court properly concluded that, regardless of the allegations in the complaint, all of "[t]he alleged incidents in the case at bar took place in or about 1977 through 1978" (Pet. App. A7) and that this suit, filed in August 1980, was therefore time-barred. Such a con-

clusion is hardly inconsistent with the decision in *Lewis*, since the Seventh Circuit in that case specifically stated that on remand the district court could find that the suit was time-barred because no act of discrimination took place during the six months preceding the filing of that suit.[3]

Moreover, whether a particular set of facts constitutes a continuing violation sufficient to avoid application of a statute of limitations is hardly an important federal question. To a large extent the basic principles to be followed in applying the continuing violation doctrine in

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[3] In an attempt to demonstrate the existence of a continuing violation petitioners grossly mischaracterize two Tenth Circuit decisions, *Robertson v. NLRB*, 597 F.2d 1331 (10th Cir. 1979), and *NLRB v. IBEW Local 322 (Bechtel Power Corp.)*, 597 F.2d 1326 (10th Cir. 1979). In *Robertson* the court held that Section 8(f) of the NLRA, 29 U.S.C. § 158(f), did not protect a portion of a referral system under which an IBEW local union hiring hall gave preference in referrals to employees who had worked for any employer who was a party to, or had adopted the terms of, a multiemployer agreement. The NLRB had reached the opposite conclusion, *Interstate Electric Co.*, 227 NLRB 1225 (1977), and subsequently declined to adopt the Tenth Circuit's interpretation of Section 8(f). *Teamsters Local 83 (Associated General Contractors)*, 243 NLRB 328, 330 n.8 (1979). Petitioners, however, cite *Robertson* for the proposition that the four-group system of referral utilized IBEW local unions is a "flagrant *per se* violation of the duty of the Union to fairly represent the employees merely because of their lack of membership in the Union." (Pet. 14) In *NLRB v. IBEW Local 322*, the Tenth Circuit enforced an NLRB decision finding that an IBEW local union committed an unfair labor practice by refusing to refer nonunion applicants and permitting such applicants to be hired only as temporary employees. Petitioner's cite this case for the proposition that a union operating a hiring hall has "an obligation . . . to affirmatively *offer* traveler's the opportunity to sign Book I, the highest referral priority, so such travelers will know they are not required to take second class status in hiring hall referrals merely because they are members of some other Local." (Pet. 15, emphasis in original) Neither *Robertson* nor *IBEW Local 322* support the inaccurate and misleading propositions for which they are cited.

cases governed by Section 10(b) of the NLRA have been settled by this Court's decision in *Local Lodge 1423 Machinists v. NLRB (Bryan Manufacturing Co.)*, 362 U.S. 411 (1960) (continued enforcement of union security clause included in collective bargaining agreement entered into by union that did not represent majority of employees was not a continuing violation).

As *Bryan* and subsequent cases demonstrate, determining whether a particular case presents a continuing violation requires a careful examination of the facts and the wrong alleged to have been committed. *Metz v. Tootsie Roll Industries, Inc.*, 715 F.2d 299 (7th Cir. 1983) (union's failure to file a grievance alleged to be breach of duty of fair representation not a continuing violation); *General Marine Transport Corp. v. NLRB*, 619 F.2d 180 (2d Cir. 1980) (employer's repudiation of collective bargaining agreement not a continuing violation); *NLRB v. Electric Furnace Co.*, 327 F.2d 373 (6th Cir. 1964) (refusal to supply union with pension information not a continuing violation). Thus, even if some basis existed for petitioners' claim that respondents in this case had committed a continuing violation of the duty of fair representation, the determination of that fact-specific claim would not constitute an important question of federal law warranting this Court's attention.

3. Petitioners also contend that the decision in this case conflicts with the Fifth Circuit's 1974 decision in *Guerra v. Manchester Terminal Corp.*, 498 F.2d 641 (5th Cir. 1974), holding that the filing of an unfair labor practice charge with the NLRB tolled the running of the statute of limitations applicable to an action under 42 U.S.C. § 1981 based upon the same facts. Yet the analysis on which the court in *Guerra* is based has since been rejected by this Court as the Fifth Circuit itself has recognized.

In *Guerra* the Fifth Circuit held that the filing of a charge with the EEOC tolled the limitation period ap-

plicable to an action under 41 U.S.C. § 1981 because "Congress intended Title VII to be an important, but not the only, weapon in the arsenal against employment discrimination", *id.* at 650, and because tolling would "encourage adjustment and settlement of grievances short of courtroom litigation." *Id.* The Fifth Circuit also stated that "this reasoning supplies a persuasive anlogy", *id.*, to a case in which an unfair labor practice case is filed prior to the initiation of a Section 1981 action and held, therefore, that the filing of such a charge tolls the limitation period applicable to a Section 1981 suit.

In *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454 (1975), this Court rejected the reasoning of the Fifth Circuit in *Guerra* and held that filing a charge with the EEOC does not toll the statute of limitations applicable to an action under 42 U.S.C. § 1981. The Court reached that conclusion because "the remedies available under Title VII and under § 1981, although related, and although directed to most of the same ends, are separate, distinct, and independent." *Id.* at 461. The Court also found "no policy reason that excuses petitioner's failure to take the minimal steps necessary to preserve each claim independently." *Id.* at 466.[4]

As the Fifth Circuit has acknowledged, this Court's decision in *Johnson* overruled *Guerra*. *Williams v. Phil Rich Fan Manufacturing Co., Inc.*, 552 F.2d 596 (5th Cir. 1977). Thus the analysis of *Guerra*, upon which the Fifth Circuit based its conclusion that filing either an EEOC charge or an unfair labor practice charge would toll the limitation period in a Section 1981 suit, has been repudiated. No basis therefore exists for contending that filing an unfair labor practice charge with the NLRB tolls the limitation period applicable to a duty of fair

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[4] The following year, in *Electrical Workers v. Robbins & Myers, Inc.*, 429 U.S. 229 (1970), the Court held the utilization of a collective bargaining grievance procedure does not toll the running of the limitations period applicable to the filing of a charge with the EEOC.

representation suit filed in a district court, and no conflict currently exists among the courts of appeals on that issue.

4. Petitioners also contend that a conflict among the courts of appeals was created by the failure of the Eighth Circuit and district court to interpret the complaint in this case to encompass the third Appeals Committee proceeding, which took place after the complaint was filed. (Pet. 22-23) Yet the petitioners do not cite *any* decision of *any* court of appeals in conflict with the decision below, and in fact, do not cite any authority whatsoever supporting the notion that a complaint must be interpreted to include events occurring after the complaint is filed.[5] In this case the district court's interpretation was a reasonable one since the 1980 grievance was not mentioned in the complaint; after the decision was issued plaintiff never asked for leave to file an amended complaint attacking that decision; and plaintiff's 110-page proposed pretrial order filed in June 1983 setting forth all matters which plaintiffs considered at issue made no mention of the 1980 grievance. Accordingly, the district court's interpretation of the complaint as excluding events occurring after the complaint was filed does not

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[5] Petitioners cite *ACRI v. Machinists*, 118 LRRM 2112 (N.D. Cal. 1983) as a case in which the complaint was interpreted to include matters submitted to an arbitrator whose decision issued after the complaint was filed. In that case, however, the complaint filed before the decision issued was "dismissed without prejudice as prematurely filed." *Id.* at 2112. Petitioners also cite *NLRB v. Fant Milling Co.*, 360 U.S. 301 (1959) in which this Court held that a complaint issued by the NLRB General Counsel could be based upon events occurring after the filing of the unfair labor practice charge initiating the Board's investigation. That case, however, offers the petitioners no support since, as the Court recognized in *Fant Milling*, "[a] charge filed with the Labor Board is not to be measured by the standards applicable to a pleading in a private lawsuit." *Id.* at 307.

provide a basis for granting the petition for certiorari in this case.[6]

5. Petitioners also challenge the district court's denial of their motion to file an amended complaint. Although leave to amend "shall be freely given when justice so requires," *Foman v. Davis*, 371 U.S. 178, 182 (1962), the decision to grant such leave is within the discretion of the district court. *Id.* Whether a district court has abused that discretion in any particular case will ultimately depend on the facts and circumstances of that case. The manner in which that discretion is exercised in an individual case hardly raises an important issue of federal law warranting review by this Court.

Moreover, the denial of leave to file an amended complaint adding three counts which is filed shortly before trial in a case which has been pending for nearly three years and in which extensive discovery has been completed, is not an abuse of discretion. The court found that the plaintiffs were well aware of their potential LMRDA claims years before the case was filed and made a conscious decision to forego those claims and pursue others. Allowing the amendment clearly would have delayed significantly the disposition of the case and greatly increased the already quite expensive cost of litigation. Thus there was ample reason to deny petitioners leave to file the amended complaint, and that denial does not provide any basis for review by this Court.

6. Finally, no basis exists for review of the district court's refusal to exercise pendent jurisdiction to hear petitioners unspecified state law claims. "It has consist-

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[6] The petition for certiorari also refers to evidence of fraudulent concealment which petitioners claim should have been sufficient to toll the statute of limitations. (Pet. 23) Yet the decisions in the unfair labor practice cases, which petitioners cite as supporting this claim, do not contain any evidence of conduct constituting fraudulent concealment.

ently been recognized that pendent jurisdiction is a doctrine of discretion, not of plaintiff's right." *Mine Workers v. Gibbs*, 383 U.S. 715, 716 (1966). The district court in this case determined not to exercise its discretion to hear petitioners state law claims because petitioners had failed to set forth their state theories of recovery and the court could not therefore determine whether the appropriate nexus existed between the state and federal claims. The refusal to exercise pendent jurisdiction in such circumstances cannot be deemed an abuse of discretion.

CONCLUSION

For all the foregoing reasons this Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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